VOL.

I

No. [redacted]

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JOINT APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1956

No. 13,152

PACKARD MOTOR CAR COMPANY, ET AL.,
Appellants,

v.

THE WEBSTER MOTOR CAR COMPANY,
Appellee.

No. 13,153

THE WEBSTER MOTOR CAR COMPANY,
Appellant,

v.

PACKARD MOTOR CAR COMPANY, ET AL.,
Appellees.

Appeals from the United States District Court
for the District of Columbia

Volume I

(Pages 1 to 471)

INDEX

	PAGE
Complaint	1
Answer	30
Plaintiffs' Interrogatories	53
Answers to Interrogatories	64
Stipulation of Facts	76
Plaintiff's Motion for a Directed Verdict	80
Plaintiff's Requested Instructions	81
Defendants' Requested Instructions	86
Statement of Counsel as to Services Rendered	94
Opposition to Application for Attorneys' Fee	112
Affidavit in Support of Application for Attorneys' Fee	116
Verdict and Judgment	118
Order Allowing Attorneys' Fee	119
Motion for Judgment Notwithstanding the Verdict Under Rule 50(b)	119
Motion for New Trial	122
Affidavit in Support of Defendants' Motion for a New Trial	128
Opinion Denying Motions	136
Order Overruling Motion for New Trial	149
Notice of Appeal (Packard)	149
Notice of Appeal (Webster)	150
Designation of Contents of Record on Appeal	151
Order for Transmission of Original Record	151

PAGE

Impaneling of Jury 154

Opening Statement on Behalf of Defendants 155

Ruling on Motion for a Directed Verdict at End of Plaintiffs' Case 466

Ruling on Defendants' Motion for a Directed Verdict at End of Whole Case 837

Opening Argument on Behalf of the Plaintiffs 847

Argument on Behalf of the Defendants 881

Argument in Rebuttal on Behalf of the Plaintiffs ... 923

Charge to the Jury 936

Verdict 959

Opinion on Application for Attorneys' Fee 962

PLAINTIFF'S WITNESSES:

Richard C. Webster:
Direct 163
Cross 213

Deposition of Marshall G. Beck:
Direct 254
Cross 308
Redirect 311

Franklin DeBaugh, Jr.:
Direct 322
Cross 332
Redirect 334
Recross 336

John Wesley Ward:
Direct 336

PAGE

Harry L. French:
Direct 337
Cross 355
Redirect 374
Recross 377

James M. Fincham:
Direct 378
Cross 413
Redirect 427

Deposition of Samuel D. Braden:
Direct 428
Cross 447
Redirect 464

DEFENDANTS' WITNESSES:

Clare E. Briggs:
Direct 472
Cross 494
Redirect 556

Roy Abernethy:
Direct 557
Cross 580
Redirect 625

Donald Dent Webster:
Direct 628

Thomas V. Maloney:
Direct 668

Robert W. Russell:
Direct 671
Cross 675
Redirect 684
Recross 685

PAGE

Francis L. Armstrong:
Direct 686
Cross 706
Redirect 759

J. Howard Ertsgaard:
Direct 761
Cross 767
Redirect 773
Recross 774

John H. Verkouteren:
Direct 777
Cross 804

Walter F. Miller:
Direct 808
Cross 825
Redirect 831
Recross 831
Re-Redirect 832

PLAINTIFF'S EXHIBITS:

Plaintiff's Exhibit 6—Dealer's Sales Agreement (Webster) 965

Plaintiff's Exhibit 9—Letter 2/14/52 Beck to Webster 968

Plaintiff's Exhibit 10—Letter 2/20/52 Webster to Beck 969

Plaintiff's Exhibit 11—Letter 3/9/52 Webster to Beck 972

Plaintiff's Exhibit 18—Letter 6/4/52 Beck to Webster 976

Plaintiff's Exhibit 20—Letter 6/11/52 Leahy to Beck 977

PAGE

Plaintiff's Exhibit 21—Letter 6/11/52 Beck to Leahy 979

Plaintiff's Exhibit 22—1952-53 Amendment to Dealer's Sales Agreement 980

Plaintiff's Exhibit 23—Lease between Somerset and Webster 986

Plaintiff's Exhibit 25—Letter 7/29/53 Leahy to Barker 989

Plaintiff's Exhibit 27—Letter 3/10/52 French to Packard 991

Plaintiff's Exhibit 29—Letter 1/2/52 Beck to McGill 992

Plaintiff's Exhibit 29a—Mutual Cancellation Agreement (Schulte) 993

Plaintiff's Exhibit 30—Letter 7/19/51 Zell to Beck .. 994

Plaintiff's Exhibit 31—Dealer Contact Report 9/20/51 995

Plaintiff's Exhibit 32—Letter 1/11/52 Zell to Beck. 996

Plaintiff's Exhibit 33—Letter 2/13/52 Zell to Briggs 997

Plaintiff's Exhibit 35—Dealer Contact Report 3/18/52 998

Plaintiff's Exhibit 36—Dealer Contact Report 3/20/52 998

Plaintiff's Exhibit 37—Letter 3/21/52 Zell to Fenn. 999

Plaintiff's Exhibit 38—Letter 3/26/52 Beck to McGill 1001

Plaintiff's Exhibit 40—Letter 4/15/52 Leahy to Beck 1002

Plaintiff's Exhibit 41—Letter 5/14/52 Zell to Briggs 1003

PAGE

Plaintiff's Exhibit 42—Memorandum 6/10/52 Armstrong to Briggs 1004

Plaintiff's Exhibit 43—Memorandum 7/8/52 Tierney to All Departments 1005

Plaintiff's Exhibit 44—Dealer Contact Report 9/27/51 1006

Plaintiff's Exhibit 46—Receipt 5/20/52 1007

Plaintiff's Exhibit 47—Letter 6/18/52 Beck to McGill 1007

Plaintiff's Exhibit 48—Letter 3/3/52 Beck to Abernethy 1009

Plaintiff's Exhibit 49—Letter 6/16/49 Braden to Zell 1011

Plaintiff's Exhibit 54—Dealer Contact Report 10/2/52 1012

Plaintiff's Exhibit 55—Letter 9/22/52 Proctor to Beck 1013

Plaintiff's Exhibit 57—Letter 9/23/52 Beck to Proctor 1014

Plaintiff's Exhibit 58—Memorandum 9/24/52 Porter to Beck 1015

Plaintiff's Exhibit 64—Dealer Contact Report 4/18/52 1016

Plaintiff's Exhibit 65—Dealer Contact Report 4/22/52 1016

Plaintiff's Exhibit 68

Schedule I 1017

Schedule I-A 1018

Plaintiff's Exhibit 69

Schedule II 1019

Schedule III 1020

PAGE

Plaintiff's Exhibit 70
Schedule IV 1021
Schedule V 1022

Plaintiff's Exhibit 71
Schedule VI 1023
Schedule VII 1024

Plaintiff's Exhibit 72—Summary of Losses 1025

Plaintiff's Exhibit 80—Advertisements 1026

Plaintiff's Exhibit 84—Telegram, Beck to McNalley .. 1030

Plaintiff's Exhibit 86—Dealer Contact Report 6/11/52 1030

Plaintiff's Exhibit 88—Dealer Contact Report 6/9/52 1031

Plaintiff's Exhibit 90—Letter 6/2/52 Beck to McGill . 1032

Plaintiff's Exhibit 91—Letter 5/27/52 Beck to Abernethy 1033

Plaintiff's Exhibit 92—Packard Organization Chart .. 1038

Plaintiff's Exhibit 93—Letter 5/7/52 Beck to Abernethy 1039

Plaintiff's Exhibit 94—Dealer Standing Report 1041

Plaintiff's Exhibit 95—Letter 4/23/52 Beck to Abernethy 1042

Plaintiff's Exhibit 96—Dealer Contact Report 4/21/52 1043

Plaintiff's Exhibit 98—Memorandum 4/18/52 Fenn to Briggs 1044

Plaintiff's Exhibit 99—Dealer Contact Report 4/18/52 1045

Plaintiff's Exhibit 100—Letter 4/7/52 Beck to Abernethy 1045

PAGE

Plaintiff's Exhibit 105—Letter 3/31/52 Beck to Abernethy 1047

Plaintiff's Exhibit 106—Dealer Contact Report 3/28/52 1048

Plaintiff's Exhibit 107—Dealer Contact Report 3/27/52 1049

Plaintiff's Exhibit 109—Letter 3/4/52 Beck to DeBaugh 1050

Plaintiff's Exhibit 110—Memorandum 3/1/52 Armstrong to Abernethy 1051

Plaintiff's Exhibit 113—Letter 3/15/51 Osband to Dealers 1052

Plaintiff's Exhibit 122 for Identification—Letter 8/31/38 Webster & Machen to Zell 1053

Plaintiff's Exhibit 124—Advertisements 1055

Plaintiff's Exhibit 128—Letter 2/11/52 Porter to Zell. 1056

Plaintiff's Exhibit 129—Miscellaneous Correspondence 1058

Plaintiff's Exhibit 131—Summary of Losses (discounted) 1067

DEFENDANTS' EXHIBITS:

Defendants' Exhibit 1—Letter 3/4/50 Webster to Braden 1068

Defendants' Exhibit 2—Questionnaire 11/30/49 1071

Defendants' Exhibit 10—Letter 4/9/52 French to Packard 1072

Defendants' Exhibit 15—Letter 6/13/51 Platfoot to Briggs 1073

Defendants' Exhibit 16—Letter 1/2/52 Marnocha to Schroeder 1075

PAGE

Defendants' Exhibit 16A—Chart 155 9/3/51 1078

Defendants' Exhibit 17—Memorandum 9/24/51 Platfoot to Briggs 1080

Defendants' Exhibit 20—Letter 12/14/51 Schulte to Beck 1085

Defendants' Exhibit 22—Letter 2/26/54 Webster to Abernethy 1086

Defendants' Exhibit 24—Memorandum 3/1/52 (Donald D. Webster) 1088

Defendants' Exhibit 25B—Consent Order in Maryland Action 1090

Defendants' Exhibit 25C—Motion to Vacate Consent Order in Maryland Action 1092

Defendants' Exhibit 25D—Order Denying Motion to Vacate in Maryland Action 1094

Defendants' Exhibit 25E—Pre-Trial Transcript 1095

Defendants' Exhibit 25F—Transcript on Motion in Maryland Action 1098

Defendants' Exhibit 26—Tabulation of Packard's Price-Class Performance 1131

Defendants' Exhibit 30—Letter 3/9/50 Scott to Packard 1132

Defendants' Exhibit 31—Dealer Contact Reports 7/21/50 and 4/20,21/50 1133

Defendants' Exhibit 37—Dealer's Sales Agreement (Zell) 1136

Defendants' Exhibit 39—Sales Activity Reports (Webster) 1141

Defendants' Exhibit 41—Retail Quota Notice (Webster) 1142

PAGE

Defendants' Exhibit 42—Advertisements 1143

Defendants' Exhibit 44—Letter 5/29/52 Crane to Dunphy 1145

Defendants' Exhibit 45—Letter 5/29/52 Crane to French 1146

Defendants' Exhibit 48—Memorandum 12/27/51 (Beck) 1147

Defendants' Exhibit 49—Dealer Sales Agreement Termination Notice (Schulte) 1148

Defendants' Exhibit 50—Letter 1/3/52 Howell to Ulaga 1149

Defendants' Exhibit 51—Memorandum 3/26/52 (Beck) 1150

Defendants' Exhibit 55—Dealer Sales Agreement Termination Notice (DeBaugh) 1151

Defendants' Exhibit 56—Memorandum 6/17/52 (Beck) 1152

Defendants' Exhibit 59—Dealer Sales Agreement Termination Notice (Webster) 1153

Defendants' Exhibit 60—Letter 6/18/52 Howell to Ulaga 1154

Defendants' Exhibit 62A—Data Respecting Eastern Dealers—1950 1156

Defendants' Exhibit 62B—Data Respecting Eastern Dealers—1951 1157

Defendants' Exhibit 62C—Data Respecting Eastern Dealers—1952 1158

Defendants' Exhibit 62D—Data Respecting Eastern Dealers—1953 1159

Defendants' Exhibit 62E—Data Respecting Eastern Dealers—1954 1160

PAGE

Defendants' Exhibit 78 for Identification—Schedule Showing Tax Benefit to Webster (Leasehold Write-off and Nash Loss) 1161

Defendants' Exhibit 79 for Identification—Schedule Showing Tax Benefit to Webster (Nash Loss) 1162

Defendants' Exhibit 80 for Identification—Schedule Showing Tax Benefit to Webster (Leasehold Write-off) 1163

Defendants' Exhibit 81A—Washington Zone Warehouse Stock 1951-53 1164

Defendants' Exhibit 81B—New Packard Sales 1950 and 1951 (DeBaugh) 1165

Defendants' Exhibit 81C—Tabulation of Sales by Packard Dealers other than Zell and Webster to Baltimore Residents, June 1952 through 1953 1166

Defendants' Exhibit 81D—Average Annual Automotive Profits (Webster) 1174

Defendants' Exhibit 81E—Schedule of Zell Advertising 1175

Defendants' Exhibit 81F—Schedule of Zell and Webster Net Working Capital 1951 1176

Defendants' Exhibit 81G—Tabulation of Used Cars Taken in Trade 1950-53 (Zell) 1177

Defendants' Exhibit 81H—Tabulation of Used Cars Taken in Trade 1950 and 1951 (Webster) 1178

Defendants' Exhibit 81I—Schedule of Average Trading Losses and Variable Gross Profit (Webster) ..1179

Defendants' Exhibit 81J—Schedule of Average Trading Losses and Variable Gross Profit (Zell) 1180

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1956

No. 13,152

PACKARD MOTOR CAR COMPANY, ET AL.,
Appellants,

v.

THE WEBSTER MOTOR CAR COMPANY,
Appellee.

No. 13,153

THE WEBSTER MOTOR CAR COMPANY,
Appellant,

v.

PACKARD MOTOR CAR COMPANY, ET AL.,
Appellees.

Appeals from the United States District Court
for the District of Columbia

[2282]*

(Filed Feb. 13, 1953)

Complaint

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 674-53

THE WEBSTER MOTOR CAR COMPANY and RICHARD C. WEBSTER,
4410 York Road, Baltimore, Maryland,

Plaintiffs,

v.

PACKARD MOTOR CAR COMPANY,
1242 24th St., N. W., Washington, D. C.
ZELL MOTOR CAR COMPANY,
11 E. Mt. Royal Ave., Baltimore, Md.
MARSHALL BECK,
1242 24th St., N. W., Washington, D. C.
C. M. PORTER,
1242 24th St., N. W., Washington, D. C.
SAMUEL HOWELL,
1242 24th St., N. W., Washington, D. C.
CLARE BRIGGS,
1242 24th St., N. W., Washington, D. C.
ROY ABERNETHY,
1242 24th St., N. W., Washington, D. C.
F. L. ARMSTRONG,
1242 24th St., N. W., Washington, D. C.
L. E. FENN,
1242 24th St., N. W., Washington, D. C., individually and as agents of defendant PACKARD MOTOR CAR COMPANY,
SIDNEY ZELL,
11 E. Mt. Royal Ave., Baltimore, Md.
O. ENGLAR GILBERT,
11 E. Mt. Royal Ave., Baltimore, Md.
J. JACKSON SMITH,
11 E. Mt. Royal Ave., Baltimore, Md.
G. DALE PROCTOR,
11 E. Mt. Royal Ave., Baltimore, Md.
JOSEPH JANIN,
11 E. Mt. Royal Ave., Baltimore, Md., individually and as agents of the ZELL MOTOR CAR COMPANY,

Defendants.

*A number in brackets [ ] indicates the page of the typewritten record on which the material following such number appears.

Complaint for Treble Damages Under Anti-Trust Laws

1. Plaintiffs bring this action to recover threefold the damages sustained by them in their business and property by reason of acts of the defendants forbidden by the Anti-trust laws of the United States and also the casts of suit [2283] including reasonable attorneys' fees, all as provided in 15 U. S. C. 15. This action arises under 15 U. S. C. Secs. 1, 2, 3, 15 and 22, commonly called the Sherman Anti-trust Act as amended by the Clayton Anti-trust Act as hereinafter more fully appears.

Jurisdiction

2. The jurisdiction of the Court is invoked under the provisions of 15 U. S. C. Secs. 1, 2, 3, 15, 22 and D. C. Code (1951) 11-306. The case involves more than $3,000 exclusive of interest and costs.

Parties

3. Plaintiff The Webster Motor Car Company, hereinafter called Webster, is a corporation organized and existing under the laws of the State of Maryland having its principal place of business in Baltimore, Maryland. Until April 1, 1952 it has been a Packard dealer, engaged in the sale of Packard automobiles, parts and accessories and the service thereof, and the buying, selling and exchange of used cars as part of its business as a Packard dealer. Plaintiff Richard C. Webster is the owner of The Webster Motor Car Company.

4. The defendants are sued jointly and severally as individuals and in the capacities which variously they occupy, including but not limited to all capacities representative or otherwise in which they acted as alleged herein.

The defendant Packard Motor Car Company, hereinafter called Packard, is a corporation organized under the laws of the State of Michigan, having its principal place of business in Detroit, Michigan. It transacts business in the District of Columbia where it maintains an office known as the Washington Zone Office in charge of defendant Beck, in which office defendants Porter and Howell are employed. The primary function [2284] of Packard's Washington Zone Office, which is wholly owned and controlled by Packard, is to receive, store, allocate, sell and distribute to "authorized" Packard dealers in the District of Columbia, Maryland, Virginia, North Carolina and other states, Packard cars, parts and accessories manufactured in Michigan and other states. Defendant Briggs during the period involved herein was Assistant and later General Sales Manager of Packard. Defendants Abernethy and Armstrong are employed in the General Sales Division of Packard. Defendant Fenn during the period involved herein was Eastern Division Sales Manager of Packard.

5. Defendant Zell Motor Car Company, hereinafter called Zell, is a corporation organized under the laws of the State of Maryland, having its principal place of business in Baltimore, Maryland. At all times herein involved it was and is a Packard dealer, engaged in the sale of Packard automobiles, parts and accessories and in the buying, selling and exchange of used cars as part of its Packard business. Since April 1, 1952 it has been the only Packard dealer authorized by Packard to sell Packard cars, parts and accessories in Baltimore, Maryland, and its suburban areas, hereinafter called Greater Baltimore. It transacts business in the District of Columbia.

6. The defendant Marshall Beck is a resident of Virginia who has a usual place of business and does business

and is found in the District of Columbia. During the post-war period involved in this action he was Assistant Zone Manager of the Washington Zone Office of Packard.

7. The defendant C. M. Porter is a resident of the District of Columbia who has a usual place of business and does business and is found in the District of Columbia. During the post-war period involved in this action he was an assistant to the defendant Beck in the Washington Zone Office.

[2285] 8. The defendant Samuel Howell is a resident of the District of Columbia who has a usual place of business and does business and is found in the District of Columbia. During the post-war period involved in this action he was the Zone Parts and Service Manager of the Washington Zone Office.

9. The defendant Clare Briggs is a resident of Michigan who has a usual place of business and does business and is found in the District of Columbia. During the post-war period involved in this action he was Assistant General Sales Manager and General Sales Manager of Packard.

10. The defendant Roy Abernethy is a resident of Michigan who has a usual place of business and does business and is found in the District of Columbia. During the post-war period involved in this action he was an Assistant General Sales Manager of Packard.

11. The defendant F. L. Armstrong is a resident of Michigan who has a usual place of business and does business and is found in the District of Columbia. During the post-war period involved in this action he was Executive Assistant to the General Sales Manager of Packard.

12. The defendant L. E. Fenn is a resident of Michigan who has a usual place of business and does business and is found in the District of Columbia. During the post-war period involved in this action he was Eastern Divisional Sales Manager and Western Divisional Sales Manager of Packard.

13. The defendants named in paragraphs 6 through 12, inclusive, have acted both individually and as agents of the defendant Packard in authorizing, ordering and doing acts which constituted in whole or in part violations of the penal provisions of the Anti-trust laws of the United States by the defendant Packard.

[2286] 14. The defendant Sidney Zell is a resident of Maryland who has a usual place of business and does business in Baltimore, Maryland. During the period involved in this action he was and still is President of Zell.

15. The defendant O. Englar Gilbert is a resident of Maryland who has a usual place of business and does business in Baltimore, Maryland. During the period involved in this action he was and still is Treasurer of Zell.

16. The defendant J. Jackson Smith is a resident of Maryland who has a usual place of business and does business in Baltimore, Maryland. During the period involved in this action he was and still is General Manager of Zell.

17. The defendant Dale Proctor is a resident of Maryland who has a usual place of business and does business in Baltimore, Maryland. During part of the period involved in this action he was Sales Manager of Zell.

18. The defendant Joseph Janin is a resident of Maryland who has a usual place of business and does business in Baltimore, Maryland. During the period involved in this action he was and still is a director and salesman of Zell.

19. The defendants described in paragraph 14 through 18, inclusive, have acted both individually and as agents of the defendant Zell in authorizing, ordering and doing acts which constitute in whole or in part violations of the penal provisions of the Anti-trust laws of the United States by the defendant Zell.

20. The defendants herein are sued individually, as conspirators and as joint actors who acting jointly and pursuant to a common intent have violated the Anti-trust laws to the injury of the public and the plaintiffs. Allegations made as to corporate defendants shall be taken to include action taken [2287] by individual directors, officers or agents who authorized, ordered or did any of the acts complained of.

ALLEGATIONS OF ACTS VIOLATIVE OF ANTI-TRUST LAWS

21. The acts of the defendants herein complained of which were violative of the Anti-trust laws and which damaged the plaintiffs in their property and business began in 1951 or early in 1952 and consisted of voluntarily entering into and participating in, or knowingly acquiescing in and participating in, contracts, agreements, arrangements, combinations and conspiracies, the purpose and inherent nature and direct and necessary effect of which was to restrain trade and commerce in the District of Columbia, and between the District of Columbia and the states of the United States, and among the several states, and to monopo-

lize or to attempt to monopolize trade and commerce among the several states, contrary to the public interest and to the injury of the public, as more particularly stated below. This would be accomplished by the obstruction of and restriction on free trade and competition, by suppression of normal competitive forces which would otherwise have been operative, by control of and limitation on or elimination of markets and outlets and of local dealings directly related and integrated to interstate trade and commerce. The said acts resulted in payment by the public of higher acquisition prices (retail price of new Packard, less used-car trade-in allowance) and higher prices for "authorized" Packard service, than would otherwise have been required and in a limitation in selection to a smaller number of Packard cars, and types and models of Packard cars, and in restriction in business opportunities which would otherwise have been available to the public, and in other public injury more particularly stated below. The said acts of defendants were designed to and did in fact operate to drive all Packard dealers in [2288] Greater Baltimore out of business, excepting only the Zell Motor Car Company, which was intended by defendants to obtain, and did in fact obtain, a monopoly of distribution of Packard cars, parts and equipment and the servicing and repairs thereof in the Greater Baltimore area, which monopoly it now enjoys.

22. The illegal confederation, combination and conspiracy and the overt acts by and through which it was conceived, executed and accomplished took place in part within the District of Columbia, although its scope was the destruction of the business and property of plaintiff in the State of Maryland and phases of the execution of the conspiracy occurred in the States of Maryland, Michigan and other states.

DEFENDANTS' PRE-WAR CONSPIRACY TO RESTRAIN INTERSTATE COMMERCE

23. Ever since 1925 and without any relaxation at any time in its purpose and efforts, Zell has sought to monopolize and control in Greater Baltimore, the acquisition and sale and servicing and repair of Packard motor cars and parts and accessories manufactured by Packard and moving in interstate commerce from the Packard factory in Detroit, Michigan and/or its Washington Zone Office to and for sale in Greater Baltimore, Maryland.

24. From at least 1937 until about the outbreak of World War II, Zell occupied, with full agreement and approval of Packard not only the position of a retail Packard dealer and service facility but also the position of exclusive wholesale distributor of Packard cars, parts and accessories in Greater Baltimore. Some years prior to 1930 Packard entered into an arrangement with Zell by which the latter became not only a retail Packard dealer and service facility but also the exclusive wholesale distributor in Greater Baltimore of Packard [2289] cars, parts and accessories. As such wholesale distributor it acquired Packard cars, parts and accessories from defendant Packard at prices lower than other companies engaged in retail sale of Packard cars, parts and accessories in Greater Baltimore.

25. As a result Zell was enabled to regulate and did regulate and control, with the full consent of Packard, all business in Packard cars, parts and accessories in Greater Baltimore, to its own advantage and profit and to the detriment of the public and in direct restraint of interstate commerce between Michigan, the place of manufacture, and Maryland, the place of sale.

26. From time to time during the pre-war years Zell, with the knowledge and consent of Packard, selected individuals and concerns to deal in Packard cars, parts and accessories which they could acquire only from Zell at prices fixed by that company and profitable to it.

27. In appearance these Zell sub-dealers were independently owned retail Packard dealers. They held themselves out as free to compete between themselves and with Zell for retail Packard sales and service business in Greater Baltimore. However, in the pre-war period (and at least from 1937 through 1941) these privately owned retail dealers were not permitted to, and in fact did not, compete freely between themselves and with Zell because Packard knowingly acquiesced in and permitted Zell, by threats to and economic coercion of the sub-dealers, to control their competitive efforts for the twofold purpose of enabling Zell to operate profitably and Packard to sell more cars in Greater Baltimore than it would have if Zell had been the only retail Packard dealer in that area. Packard permitted, encouraged and with full knowledge actively participated in Zell's regulation and restriction of the competition [2290] of the other retail Packard dealers in Greater Baltimore because Zell was one of its largest and most expensive-to-maintain privately-owned Packard distributorships. Had Packard and Zell permitted the smaller, more efficient Packard dealers in Greater Baltimore to compete freely and fairly with each other and with Zell it would have caused Zell to lose money and eventually to give up the Packard franchise because of Zell's inability to meet such competition. The defendant Packard, fearing that it would suffer a temporary set back and loss of sales and prestige if Zell gave up the Packard franchise (and especially so if after

so doing Zell took on a competitive automobile franchise), acquieseed and participated in Zell's trade restraining manipulations as described above and hereinafter, even though by so doing Packard sold fewer cars in Greater Baltimore than it would have with a competitive multiple dealership system, and even though by so doing Packard knowingly joined in an illegal conspiracy in fraud and deception of the public, in restraint of interstate commerce and to the serious injury of the plaintiffs as more particularly described hereinafter.

28. Zell, with the knowledge and approval of Packard, controlled the allowances these sub-dealers were permitted to make on used cars offered in trade on new Packards, requiring such dealers to fix the allowance below what the Zell company would offer, which allowance would be substantially below what the sub-dealers would have allowed had they been permitted to purchase their cars, parts and accessories direct from Packard and had they been free from the domination and control of Zell and free to compete among themselves and with Zell. The result was that in many such cases the sale went to Zell, enhancing its profits in fraud of and at the expense of the public and the more efficient sub-dealerships.

[2291] 29. In the same way, Zell, with the knowledge and approval of Packard, prescribed and controlled the charges made by its sub-dealers for service and repairs and required of the sub-dealers that such charges be maintained at Zell's own level which was higher than the charges would have been had Zell and Packard allowed the sub-dealers to compete freely and fairly with each other and with Zell.

30. From 1926 until 1937 the plaintiff Richard C. Webster was a Packard salesman for Zell. During those

years Mr. Webster not only sold more new Packards than any other Zell salesman, but in fact sold more new Packards than any other Packard salesman in the world. Having sold millions of dollars worth of Packards to Baltimore buyers, he had acquired a large number of customers and friends. He was desirous of starting his own Packard sales and service business and because of his unparalleled record as a Packard salesman was encouraged in his desire by Packard's highest officials. Consent to do so, with his own capital, as a sub-dealer under Zell was given in 1937 in consideration of a waiver by Mr. Webster of substantial bonuses owed him by Zell on account of his sales in 1935 and 1936. Mr. Webster associated with himself Raymond Machen; and the sub-dealership was incorporated under the name of Webster and Machen, Inc.

31. Almost immediately after Richard Webster had invested all his savings in establishing Webster and Machen, Inc., with the belief that Packard would not permit Zell to unfairly restrain the infant company's competitive efforts, Zell, with the consent and approval of Packard, sought to and did impose numerous restrictive conditions upon the firm's operations, the intended and actual effect of which was to enhance Zell's profits by destruction of competition to the injury of Webster and Machen, Inc. and the public, and in restraint of interstate commerce.

[2292] 32. Among the restraints exerted upon Webster & Machen was Zell's requirement that the Webster firm should increase its charges for labor cost from $1.50 to $2.00 per hour, the latter being Zell's charges, and to discontinue night service; all under threat of cancellation of Webster's franchise if it failed to comply.

33. A further restraint so exerted on Webster & Machen was an order by Zell that Webster & Machen should not sell a new Packard car to any Packard owner not theretofore sold by Richard C. Webster, thus preventing the Webster firm from obtaining any new customers from among the public ranks of Packard owners. Even sales to many of Mr. Webster's old customers were forbidden by Zell which threatened immediate cancellation of Webster & Machen's franchise if Zell's trade-restraining demands were not met.

34. A further restraint was Zell's complaint to Richard Webster that his firm was selling too many cars, followed by Zell's direction that the Webster firm should curtail its efforts. The latter was advised and directed by Packard to comply with Zell's demands and to limit its business to the point where it could barely sustain the Webster firm's organization.

35. A further restraint imposed under threat of cancellation was Zell's order that the Webster firm should allow on used cars offered in trade a sum much smaller than the Webster firm was willing to allow and could profitably have allowed, with the object of enabling Zell to offer a slightly higher allowance and thus make the sale.

36. The restraints enumerated in paragraphs 31 to 35, inclusive, were specifically brought to the attention of Packard, which after a full investigation refused to make Zell put a stop to them, Packard's stated reason being that Zell had a large investment which must be protected.

[2293] 37. Thereafter, Sidney Zell, with the knowledge and approval of Packard, offered to buy out the Webster firm at forty (40) cents on the dollar without offering

anything for good will and threatened to refuse to sell Packard cars, parts and accessories to the Webster firm if it did not accept the offer.

38. After the Webster firm's refusal to accept the offer, Zell, on July 8, 1938, sent the Webster firm a notice of cancellation of its sub-dealership franchise. That firm once more appealed to Packard, which again acquiesced in Zell's actions and refused to interfere for the same reason as theretofore, namely the Zell company's large investment which must be protected.

39. Faced with destruction of their business and financial disaster, the Webster firm was compelled to accept on August 31, 1938 a new arrangement dictated by Zell, and known to and acquiesced in by Packard, which embraced numerous illegal trade restraining commitments.

40. Among such illegal restraints was the requirement that the Webster firm could not solicit or attempt to sell any Packard owner who had previously bought a Packard from the Zell company, except a limited number whose cars had been sold them by Webster personally when he was employed by Zell.

41. A further illegal restraint was that the Webster firm was required not to solicit service or repair work from Zell's other sub-dealers on allowances for used cars and to agree to "give the owner a low appraisal which will probably cause the owner to return to the store where he originally purchased his Packard."

42. A further illegal restraint was that the Webster firm was required to "cooperate" with the Zell company and persons [2294] who had bought cars from Zell, and was

required to conform its service charges to levels fixed by Zell for its own services.

43. A further illegal restraint imposed by Zell was its requirement that the Webster firm's advertising must first be cleared with Zell and that no radio advertising of any kind should be permitted.

44. A further illegal restraint imposed by Zell was its requirement that the Webster company should give up its used car salesroom.

45. Shortly after the making of the above arrangement, the firm of Webster & Machen was dissolved and plaintiff corporation was formed, which was required to assume and take over the obligations of the said arrangement.

46. Plaintiff corporation was compelled to operate under the said arrangement until the outbreak of World War II, when Packard ceased the manufacture of civilian cars.

47. The said arrangement, embodying the restraints alleged in paragraphs 40 to 45, inclusive, was approved and acquiesced in by Packard.

DEFENDANTS' CONSPIRACY TO RESTRAIN TRADE, 1951-52; MONOPOLY EFFECTED 1952

48. Following the end of World War II, when Packard resumed the manufacture of civilian cars, it established a system of distributing its cars, parts and accessories in Greater Baltimore by direct dealer franchises enabling holders thereof to make purchases, each at the same price,

from Packard's Washington Zone Office, located in Washington, D. C. Such franchises were thereafter issued by Packard to the following Greater Baltimore dealers: Zell; Webster; DeBaugh Motors; Will Scott, Inc.; Schulte Motors, Inc.; and Northwestern Motors, Inc. During the post-war years from 1946 through part [2295] of 1951, Packard encouraged fair and vigorous competition between these Greater Baltimore Packard dealers. As a result of said encouragement, the public was benefited, the plaintiffs made profits but Zell suffered heavy losses.

49. These post-war dealer franchises were based on a printed "Packard Dealer's Sales Agreement", the terms of which were prescribed by Packard.

50. Although the said Agreement was so devised as to enable Packard, whenever it saw fit to so interpret its provisions, to employ the Agreement as an instrument to coerce and restrain its dealers, and thereby to effect unlawful restraints of trade and commerce between the states and in the District of Columbia, Packard refrained from so employing the Agreement against the plaintiff until sometime in 1951 or early in 1952.

51. However, in 1951 or early 1952, Packard, for the sole purpose of effecting a conspiracy with Zell to give the latter a monopoly of the "authorized" Packard sales and service business in Greater Baltimore, interpreted and enforced the terms of its Dealer's Sales Agreements with DeBaugh Motors and the plaintiff corporation in such an unlawful manner that by April 1, 1952 the defendants had accomplished their objective of according Zell a monopoly of all "authorized" Packard sales and service in Greater Baltimore.

52. Plaintiffs allege that the provisions of the Dealer's Sales Agreement as thus unlawfully interpreted and enforced by Packard in 1951 and early 1952 enabled Packard, under the guise of acting within its contractual rights, to direct, control and unlawfully restrict commerce between the states, between the states and the District of Columbia, within the District of Columbia, and in Greater Baltimore. The following specific [2296] provisions of the Dealer's Sales Agreement—viz.: the provisions as to prices; the provisions vesting in Packard power of interpretation as to the adequacy of the dealer's compliance with various obligations; the provisions absolving Packard from damage claims for non-performance on its part; the fixing of quotas and working capital subject to change at the sole decision of Packard; the control of the nature and amount of the dealer's advertising; the restraints on alienation of interest in the dealer's business; the provisions as to termination for alleged violations, the existence of which rested in many respects on Packard's own evaluation; the provision for automatic termination in one year, even though extensions were customarily given; Packard's violation of the express terms of the Agreement in setting up factory-owned metropolitan dealerships, expressly designated "retail" sales agencies with obvious competitive advantages over its independently-owned retail agencies; the provisions leading to inevitable and serious financial loss on termination; and various other provisions;—all enabled Packard to hold a whip over its dealers and by economic coercion to direct and control their operations, which consequently were wholly different from those which would have obtained had they been free from those controls and free to compete with each other. The manner in which this power was unlawfully exerted by Packard in conspiracy with the other defendants in 1951 and

1952 to enable Zell to monopolize the Packard business in Greater Baltimore, and to suppress all Packard dealer competition with Zell in that area, and to destroy the business and property of the plaintiffs, to the damage of the plaintiffs and the Greater Baltimore public, is stated in the following paragraphs.

53. From the time in or about 1945 when Webster became a direct dealer of Packard—as distinguished from a sub-dealer [2297] under Zell—following the resumption of manufacture of cars for civilian use after World War II, and until forced out of the Packard business by the conspiracy and joint actions of the defendants in 1952, Webster did a very successful business as a Packard dealer and competed freely and fairly with the other Greater Baltimore Packard dealers, including Zell. The plaintiff company made substantial profits each year and Mr. Webster received a large salary and also dividends. Webster built up a large and valuable good will with its customers and with the Baltimore public. Packard made no complaints. Webster's franchise was renewed year by year without any question or condition, and Webster was led to believe that its franchise would continue indefinitely in the absence of acts or omissions which might justify cancellation for cause. Because Packard was no longer unlawfully restraining trade, even though Zell continued to threaten to give up the Packard franchise unless Packard eliminated its competitive multiple dealership system in Greater Baltimore, Richard Webster concluded that Packard had abandoned its unjust and oppressive pre-war policies.

54. In November, 1949, fire completely destroyed Webster's place of business at 4410-4420 York Road, Baltimore, Maryland. Packard, acting through Mr. Samuel Braden

(Packard's then Zone Manager), the defendant Beck and others urged Mr. Webster to buy the land on which the building had been located and there erect new and improved buildings specially designed for a Packard automobile sales room, repair shop, used car lot, etc. Plans were drawn by Packard and submitted to Mr. Webster. These plans called for a building usable only as an automobile sales and service property and required an investment of approximately $125,000. Plaintiff corporation submitted to [2298] Packard alternative plans which it approved. On Packard's advice Richard C. Webster caused the organization of a new corporation known as Somerset Realty Company (the stock of which was owned by him and his family) which bought the real estate and in accordance with Packard's advice entered into a ten year lease with Webster under the terms of which Webster was to pay as prepaid rent the cost of improving and equipping the buildings. The investment in acquiring the land, erecting the buildings and buying the equipment totaled approximately $90,000. The conduct and statements of Packard in connection with these transactions were intended to lead, and were such as reasonably did lead, to a belief and expectation that Webster's dealer's franchise would continue from year-to-year, as theretofore, and at least until the expiration of the ten-year lease and recovery of rent prepaid by Webster as above stated.

55. Plaintiffs are informed and believe and therefore allege that Zell, during the period since the end of World War II and until it acquired a monopoly of the "authorized" Packard sales and service business in Greater Baltimore in April, 1952, steadily lost money on its automotive sales and service operations and, beginning in 1951 or early 1952, was successful in persuading Packard to conspire to aid

and assist it to once again restrain trade and commerce by eliminating as competitors the plaintiff Webster and certain other Packard dealerships in Greater Baltimore.

56. To that end Packard on or about March 4, 1952 notified DeBaugh Motors, Towson, Maryland, that its Dealer's Sales Agreement with Packard would not be renewed on April 1, 1952, and directed it to wind up its affairs in accordance with provisions of said Agreement. Packard gave no grounds for this action. On March 4, 1952 DeBaugh Motors and Webster were [2299] the only authorized Packard dealers competing with Zell for Packard sales and service in Greater Baltimore.

57. Thereafter, Packard ordered DeBaugh Motors to take down its Packard signs and refused to take back unused Packard parts. Packard advised against selling these parts to the Webster corporation and referred DeBaugh to Zell to liquidate the unused parts.

58. Packard and Zell, acting through defendants Briggs, Beck, Porter, Proctor and Sidney Zell had conspired and arranged to have Packard refuse to renew DeBaugh Motor's direct dealer franchise and thus to force DeBaugh Motors to become once again, as it was before World War II, a non-competitive sub-dealer for Zell. In accordance with this unlawful conspiracy and arrangement DeBaugh's franchise was terminated on April 1, 1952, and in order to avoid financial ruin DeBaugh was forced, in consideration of obtaining Zell's and Packard's permission to continue to sell new Packards and perform "authorized" Packard service, to agree to purchase all new Packard cars, parts and accessories from Zell, instead of Packard, at prices profitable to Zell.

59. The said arrangement with Zell required DeBaugh to purchase cars from Zell at 20% off the retail price set by Packard, instead of the dealer's normal 24% discount. In the same way DeBaugh would purchase parts from Zell at 30% off rather than the dealer's usual 50% off, which Zell continued to enjoy.

60. Under the said arrangement Zell was permitted by Packard to require DeBaugh to have all cars which DeBaugh purchased from Zell undercoated, simonized and serviced by Zell prior to delivery, at an additional cost to DeBaugh of $50 per car.

[2300] 61. The said undercoating, simonizing and servicing were not essential or required by DeBaugh or the eventual purchasers but were forced upon DeBaugh and the public. Further, the said services could be and were in times past done by DeBaugh at less cost to DeBaugh and to the eventual purchasers.

62. The arrangement with Zell set forth in paragraphs 58 to 61, inclusive, was engineered and fully approved by Packard and by defendants Sidney Zell, Proctor, Beck, Porter and Briggs. Defendant Beck, head of Packard's Washington Zone Office, urged DeBaugh Motors to make the arrangement with Zell, stating that Zell was losing money and that it was "up to us to get them out of the red."

63. As a result of this unlawful conspiracy by and between the defendants, DeBaugh, having no alternative but liquidation through Zell, was compelled to accept the arrangement above set forth and commenced operating and is now operating as a subdealer under defendant Zell.

64. In 1951 and 1952, while the defendants were conspiring, arranging and effecting the termination of DeBaugh's direct dealer franchise agreement, thus eliminating one of Zell's two remaining Packard dealer competitors in Greater Baltimore, they were also conspiring and arranging for the termination of Webster's direct dealer franchise agreement. It was a part of said conspiracy, and the object and purpose thereof, to accomplish the following, among other things:

A. To eliminate Webster from competition with Zell in the sale and service of Packard cars, parts and accessories, and to appropriate to Zell Webster's business in the sale and service of Packard cars, parts and accessories.

[2301] B. To restrain and restrict the interstate shipment of new Packard cars, parts and accessories and to create for Zell a monopoly in the sale and "authorized" service thereof in Greater Baltimore, to the end that Zell might obtain from the purchasing public higher prices and higher profits.

C. To fix arbitrarily the prices to be allowed on used automobiles when offered in trade on new Packards, and thus to obtain from the purchasing public in Greater Baltimore abnormally large, non-competitive profits.

In furtherance of said conspiracy, Packard sent two of its representatives, defendants Beck and Porter, to see Richard Webster for the purpose of arranging for Webster to either go out of business under circumstances which would make it appear that Webster had done so voluntarily, or become, as pre-war, a controlled, non-competitive Zell subdealer.

65. Packard's said representatives with intent to deceive, mislead and defraud Richard Webster advised him that Packard officials at their home office in Detroit were of the opinion that it would be to his best interests to liquidate the plaintiff corporation; and they informed him that Webster's franchise agreement would not be renewed. The said Beck and Porter attempted to persuade Mr. Webster to liquidate the plaintiff corporation even though they admitted that Packard had no cause for complaint against Webster.

66. Thereafter, Packard's Zone Office in Washington on February 13, 1952, through defendant Beck, wrote Richard Webster a false and misleading letter stating that he had agreed to liquidate Webster and setting July 1, 1952 as a [2302] deadline for such liquidation. The said letter stated that "In order that we will be able to chart our future in Baltimore, we would like to set July 1, 1952 as the deadline or latest date for the termination of your Packard dealer's sales agreement." On February 20, 1952, Richard Webster replied to this letter, denying its incorrect statements and pleading for continuation of the plaintiff corporation's franchise.

67. Webster protested against the proposed liquidation and repeatedly requested a renewal of its Agreement with Packard. Packard continued to insist on liquidation, and for the purpose of coercing Webster into becoming a Zell controlled sub-dealer or into liquidating, it named Zell as the liquidating agent. Defendant Fenn, Packard's Eastern District Sales Manager, and defendant Beck made arrangements with Zell for the said liquidation or subjugation.

68. Defendant Beck made clear that Zell, in liquidating, dissolving or absorbing Webster, would pay nothing for Webster's good will. Beck advised Webster that it should not expect Zell to pay anything for Webster's good will because Packard did not intend to renew Webster's franchise on April 1, 1952, and hence Webster's good will thereafter would be valueless. Beck so advised Webster in spite of the fact, as he well knew, that before becoming a Packard dealer in 1937, Richard Webster had for many years sold more Packards in and around Baltimore than any other Packard salesman had sold anywhere else in the world, and even though he also knew that as a dealership Webster had spent hundreds of thousands of dollars from 1937 to 1952 in building up the value of its good will through advertising, sales promotion, display and other media, many of which were suggested by Packard but paid for by Webster.

[2303] 69. Defendant Beck in the course of his attempt to secure Webster's liquidation by or subjugation to Zell stated that Packard had adopted the policy of having only one authorized franchised dealer for Baltimore, the Zell company.

70. Thereafter, Packard continued to attempt to force Webster to liquidate through the Zell company which plaintiff continued to resist. On April 1, 1952, Webster's franchise expired.

71. On April 3, 1952 defendants Beck and Porter once more advised Richard Webster that Packard expected Webster to liquidate by July 1, 1952. In an effort to produce such liquidation, Packard offered to take back Webster's new but unsold parts provided Richard Webster would sign an agreement to liquidate the plaintiff corporation by

July 1, 1952. Richard Webster resisted and refused this offer.

72. On April 15, 1952 plaintiffs' attorneys advised Packard that its acts with the other defendants constituted a violation of the Anti-trust Acts and that they would be compelled to file suit.

73. On April 18, 1952, defendants Porter and Howell, with knowledge of the impending suit, and on behalf of Packard and Zell, without notifying Richard Webster, submitted to Mr. Harry French, President and General Manager of the plaintiff corporation (as such authorized to enter into all contracts in its behalf), what they told him was a one year renewal of Webster's Dealer's Sales Agreement. They attempted to persuade him to sign the last page of the contract without giving him the preceding pages to read. When he suggested that before signing he would have to discuss the proffered Dealer's Sales Agreement with Mr. Richard Webster, in accordance with uniform company policy of previous years, Porter threatened French that [2304] if he then and there refused to sign the last page, Packard would hold that Webster had rejected the contract. Nonetheless, French refused to sign and Porter and Howell left without leaving a copy of the proffered contract. It later appeared that the contract, the last page of which Porter attempted to force French to sign, was the same contract which Richard Webster had expressly refused to sign on April 3, 1952, when offered the opportunity to do so by Beck and Porter. That agreement would have renewed Webster's Dealer's Sales Agreement for only three months, during which time Webster would be permitted to return certain new parts to Packard, in consideration of which Webster would have to liquidate by July 1, 1952.

74. On June 4, 1952 defendant Beck wrote plaintiff corporation as follows:

> "The term of the Packard Dealer's Sales Agreement between this company and your company dated June 2, 1949, as amended, expired as provided therein on March 31, 1952.
>
> "On or about April 22, 1952, there was tendered to and left with you for execution a proposed 1952-53 Amendment to Packard Dealer's Sales Agreement, the effect of which when executed by both parties would be to extend your Packard Dealer's Sales Agreement to March 31, 1953. It was requested at the time that the same be completed and returned to the Zone Office not later than April 29, 1952.
>
> "The proposed 1952-53 Amendment to Packard Dealer's Sales Agreement has never been returned to the Zone Office by you notwithstanding that on or about May 20, 1952, a promise was made on your behalf that the Zone Office would be notified of your decision within one week thereafter.
>
> "In view of your failure to return this executed form to us, we are obliged to advise you that unless same is received by the Zone Office on or before June 11, 1952, duly executed by your company, the same will not thereafter be accepted for execution by the Zone Office, and we shall without further notice to you treat as immediately operative the provision of your Sales Agreement under the heading 'Transactions After Termination of Dealer's Sales Agreement,' and in such event you shall consider this letter our demand for prompt settlement of all the existing obligations between the parties and the performance of all other clauses operative in such case."

[2305] 75. On May 20 and June 10 plaintiffs' attorneys advised defendant Beck that in view of Packard's actions Webster desired assurances of fair-dealing from

Packard before entering into a new contract and in particular an assurance that the making of a one-year contract was not a mere subterfuge to avoid a lawsuit. On June 11, plaintiffs' attorneys wrote the following letter to Packard's Zone representative:

> "During our discussion on Monday I stated to you that in view of the events of the last two months the Webster Company had serious misgivings as to whether Packard could be relied on to deal with it in good faith if it accepted your offer of a one-year renewal, bearing in mind that there are a thousand ways in which a big company can make things unbearable for one of its dealers or handle matters in such a way as to put one dealer at a disadvantage with another. Also I voiced Webster's fear that the renewal might be for a limited period only, and hence in the nature of a postponement of a death sentence.
>
> "You told me that there was no reason at all to fear that Packard would handle matters in Baltimore to the disadvantage of Webster or fail to deal with Webster in entire good faith. As to Webster's second fear, you stated that Packard traditionally operated under one-year contracts and that this was done purposely to allow Packard full freedom to change its policy as circumstances might require, but that short of some intervening and unpredictable event there was no reason to believe that Webster could not look forward to annual renewals in the future as it had in the past.
>
> "I am wondering whether there is not some way by which the company itself could give us formal assurances along the lines above indicated. I am moved to this suggestion partly by intimation made by company representatives at our May 20th conference to the effect that Packard conceivably might wish to have one large dealer for the entire Baltimore

area as it has in other Metropolitan areas. Of course, this seemed directly applicable to the Zell situation and served to renew Webster's fears.

"As we are attempting to settle differences by entering into a renewal of a contractual relationship you will, I am sure, as a good business man see the desirability of clearing away all dead timber. The time to remove doubts and misgivings is now, before any renewal is signed. It is in this spirit that I am writing the present letter.

"In the event that the assurances above-referred to are given, I am authorized to advise you that the Webster Motor Car Company will sign a renewal contract."

[2306] The reply to the said letter was as follows:

"Regarding your letter of June 11, 1952, the entire terms of our offer to Webster Motor Car Company are contained in our letter to that company dated June 4, 1952. No commitment has been nor will be made with reference to any alleged understanding not contained in the proposed written amendment referred to in our letter of June 4, 1952."

76. Thereupon plaintiffs were forced to desist in their efforts to find an amicable solution to their grievances against Packard and advised the latter that having been forced out of the Packard business they would file suit for redress, and pending decision thereof would attempt to minimize damages as much as possible.

77. At no time during the course of the defendants' 1951-1952 conspiracy did Packard make any material complaint as to the way in which Webster conducted its business; at no time did Webster fail to comply with its contract obligations in respect of quota or performance, or in the

conduct of its service, accessory or used car business. In many instances Webster acceded to unlawful demands by Packard, such as declining to accept, as a second retail sales item, the Austin distributorship when it was offered Webster in 1951.

78. Packard's only explanation of its conduct in thus terminating as of April 1, 1952, DeBaugh Motors' franchise and Webster's franchise is defendant Beck's statement that Zell was losing money and it was up to Packard to get them out of the red.

79. It is further alleged that as a direct and necessary result of defendants' 1951-1952 conspiracy, which was intended to and in fact did result in the termination of Webster's Dealer's Sales Agreement and Zell's acquisition of a monopoly of all "authorized" Packard business in Greater Baltimore, [2307] interstate commerce of Packard cars, parts and accessories from Michigan into the District of Columbia and into Maryland, and within the District of Columbia, is seriously, unduly, and illegally restricted, causing many less Packard cars, parts and accessories to move in said commerce than would otherwise move had defendants refrained from engaging in and effecting such conspiracy.

80. It is further alleged that as a direct and necessary result of defendants' 1951-1952 conspiracy, the public in Maryland, and in particular in Greater Baltimore, since April 1, 1952, has been deprived of competition among dealers for the sale to the public and servicing of Packard cars and has been seriously and illegally damaged by having a smaller stock of new Packard cars and parts from which to select than would be there available were it not for said conspiracy and resultant Zell monopoly.

81. It is further alleged that as a direct and necessary result of defendants' 1951-1952 conspiracy, the public in Maryland, and in particular in Greater Baltimore, since April 1, 1952, has been seriously and illegally damaged by having to pay higher "acquisition prices" (retail price of new Packard, less used car trade in allowance) and higher prices for "authorized" Packard service and parts; as well as by being forced to purchase new Packard cars, parts, accessories and "authorized" service from a less convenient source and from less efficient personnel.

82. On information and belief the plaintiffs say that in addition to the specific acts of the defendants above described there were numerous meetings and discussions and exchanges of letters among the defendants in and by which the illegal 1951-1952 conspiracy and arrangement herein complained [2308] of was planned, discussed, agreed upon and implemented as will more fully appear at the trial of the case.

WHEREFORE, the plaintiffs say that they have been damaged in their business and property by the 1951-1952 acts of the defendants violative of the Antitrust laws of the United States to the extent of $1,000,000 and pray for judgment in that amount, trebled in accordance with law, and for the costs of suit, and for a reasonable attorneys' fee.

WILLIAM E. LEAHY
WILLIAM J. HUGHES, JR.,
1000 Bowen Building
Washington, D. C.
Attorneys for Plaintiff

Answer of Packard Motor Car Company, Marshall B
C. M. Porter and Samuel Howell

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury of all issue
the above action.

WILLIAM E. LEAHY
WILLIAM J. HUGHES,
1000 Bowen Building
Washington, D. C.
Attorneys for Plaintiff.

[2319] (Filed Mar. 9, 1953)

Answer of Packard Motor Car Company, Marshall Bec
C. M. Porter and Samuel Howell

PACKARD MOTOR CAR COMPANY, MARSHALL BEC
C. M. PORTER and SAMUEL HOWELL answer the complai
herein as follows:

[2320] FIRST DEFENSE

The complaint fails to state a claim against these d
fendants upon which relief can be granted.

SECOND DEFENSE

Plaintiff Richard C. Webster is not a proper party an
his complaint fails to state a claim against these defendant
upon which relief can be granted.

Answer of Packard Motor Car Company, Marshall Beck, C. M. Porter and Samuel Howell

THIRD DEFENSE

Plaintiffs have not been injured by reason of any of the alleged acts asserted to be forbidden by the anti-trust laws.

FOURTH DEFENSE

As to any claims set forth in the complaint accruing prior to February 13, 1950, the action was brought after three (3) years from the time when the right to maintain such action accrued, and said claims are barred by the Statute of Limitations (Title 12, Section 201, Code of the District of Columbia (1951 ed.); Article 57, Section 1, Flack's Code of Maryland (1951 ed.)).

FIFTH DEFENSE

1. Deny each and every allegation contained in paragraph 1 of the complaint, except that they admit that plaintiffs seek to recover under the laws therein mentioned.

2. Deny each and every allegation contained in paragraph 2 of the complaint, except that they admit that the plaintiffs seek to invoke jurisdiction under the laws therein mentioned.

3. Admit the allegations contained in paragraph 3 of the complaint, except that they state that they are without knowledge or information sufficient to form a [2321] belief as to the truth of the allegations that Richard C. Webster is the owner of The Webster Motor Car Company, and

that it is a corporation organized and existing under
laws of the State of Maryland, *and except that they d*
that The Webster Motor Car Company ceased to b
*Packard dealer on or about April 1, 1952.**

4. Deny each and every allegation contained in pa
graph 4 of the complaint, except that they admit: t
plaintiffs seek to assert a claim against defendants join
and severally as individuals and in various asserted capa
ties; that defendant Packard Motor Car Company (he
inafter called Packard) is a corporation organized un
the laws of the State of Michigan, having its principal pl
of business at 1580 East Grand Boulevard, Detroit, Mic
gan; that Packard transacts business in the District
Columbia, where it maintains an office known as
Washington Zone Office in charge of defendant Be
that defendants Porter and Howell are employed in
Washington Zone Office; that the primary function
the Washington Zone Office, which is wholly-owned a
controlled by Packard, is to sell to authorized Packa
dealers, Packard cars, parts and accessories manufactur
in Michigan and other states, and to receive, store a
distribute to said dealers parts and some of said cars a
accessories, in the District of Columbia, Maryland, V
ginia, North Carolina and certain other states; that Cla
Briggs was Assistant Sales Manager of Packard from
or about June 1, 1944 to October 16, 1951, General Sa
Manager of Packard from October 16, 1951 to August
1952, and now is, and ever since August 14, 1952 has be
Marketing Manager of Packard; that Roy Abernet

*Italicized portion of this paragraph added by order of April
1955, amending answer.

and F. L. Armstrong are employed in the General Sales Division of Packard; that L. E. Fenn was Eastern Division Sales Manager of Packard [2322] from November 19, 1951 to October 1, 1952, and now is, and ever since October 1, 1952 has been, Parts and Accessories Merchandising Manager of Packard.

5. Deny each and every allegation contained in paragraph 5 of the complaint, except that they admit: that Zell Motor Car Company (hereinafter called Zell) is a corporation organized under the laws of the State of Maryland, having its principal place of business in Baltimore, Maryland; that Zell was an authorized wholesale Packard distributor from September 1, 1922 to September 1, 1944; that Zell now is, and ever since September 1, 1944 has been, a retail Packard dealer; that during all of said times Zell was, and now is, engaged in the sale at retail of Packard automobiles, parts and accessories and in the buying, selling and exchange of used cars as a part of its business; [that since April 1, 1952, Zell has been the only authorized Packard dealer located in Baltimore, Maryland;]* and except that they state that they are without knowledge or information sufficient to form a belief as to the truth of the allegation that Zell transacts business in the District of Columbia.

6. Deny each and every allegation contained in paragraph 6 of the complaint, except that they admit that defendant Beck is a resident of Virginia; that he is employed in the District of Columbia; that he was Business Manager of the Washington Zone Office from September 22, 1947

*Words in brackets deleted by order of April 1, 1955, amending answer.

to November 1, 1949, Assistant Zone Manager of the Washington Zone Office from November 1, 1949 to January 1, 1951, and that he now is, and ever since January 1, 1951 has been, Zone Manager of the Washington Zone Office.

[2323] 7. Deny each and every allegation contained in paragraph 7 of the complaint, except that they admit that defendant Porter is a resident of Virginia; that he is employed in the District of Columbia; that he now is, and ever since June 25, 1951, has been, Packard City Manager for Washington, D. C. and Baltimore, Maryland, under Beck in the Washington Zone Office.

8. Deny each and every allegation contained in paragraph 8 of the complaint, except that they admit that defendant Samuel Howell is a resident of Virginia; that he is employed in the District of Columbia; that he was Assistant Parts and Service Manager of the Washington Zone Office from January 15, 1951 until June 25, 1951, at which time he became, and ever since has been, Parts and Service Manager of the Washington Zone Office.

9. Deny each and every allegation contained in paragraph 9 of the complaint, except that they admit that Clare Briggs is a resident of Michigan; that from on or about June 1, 1944 to October 16, 1951, he was Assistant General Sales Manager of Packard, and from October 16, 1951 to August 14, 1952, he was General Sales Manager of Packard; and that he now is, and ever since August 14, 1952 has been, Marketing Manager of Packard.

10. Deny each and every allegation contained in paragraph 10 of the complaint, except that they admit that Roy

Abernethy is a resident of Michigan; that from June 1, 1946 to October 31, 1948, he was Eastern Regional Manager of Packard; that from October 16, 1951 to October 1, 1952, he was Assistant General Sales Manager of Packard; and that he now is, and ever since October 1, 1952 has been, Assistant General Sales Manager, Eastern Division.

[2324] 11. Deny each and every allegation contained in paragraph 11 of the complaint, except that they admit that F. L. Armstrong is a resident of Michigan; and that he now is, and ever since July 23, 1945 has been, Assistant to the General Sales Manager of Packard.

12. Deny each and every allegation contained in paragraph 12 of the complaint, except that they admit that L. E. Fenn is a resident of Michigan; that from November 19, 1951 to October 1, 1952 he was Eastern Division Sales Manager, and that he now is, and ever since October 1, 1952 has been, Parts and Accessories Merchandising Manager of Packard.

13. Deny each and every allegation contained in paragraph 13 of the complaint.

14. Admit the allegations contained in paragraph 14 of the complaint, except that they state that they are without knowledge or information sufficient to form a belief as to the truth of the allegation that Sidney Zell was President of Zell during the entire period involved in this action.

15. State that they are without knowledge or information sufficient to form a belief as to the truth of the allega-

tions contained in paragraph 15 of the complaint, except that they admit that O. Englar Gilbert is Treasurer of Zell and that he is employed in Baltimore.

16. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of the complaint, except that they admit that J. Jackson Smith was General [2325] Manager of Zell for some time prior to April 1950, at which time he became a new car salesman of Zell, and that he is employed in Baltimore.

17. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17 of the complaint, except that they admit that Dale Proctor is General Sales Manager of Zell and that he is employed in Baltimore.

18. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the complaint, except that they admit that Joseph Janin is a director and salesman of Zell and that he is employed in Baltimore.

19. State that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 19 of the complaint.

20. Deny each and every allegation contained in paragraph 20 of the complaint.

21. Deny each and every allegation contained in paragraph 21 of the complaint.

Answer of Packard Motor Car Company, Marshall Beck, C. M. Porter and Samuel Howell

22. Deny each and every allegation contained in paragraph 22 of the complaint.

23. State that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 23 of the complaint.

[2326] 24. Defendants Beck, Porter and Howell state that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 24 of the complaint. Defendant Packard denies each and every allegation contained in paragraph 24 of the complaint, except that it admits that from September 1, 1922 to September 1, 1944, Zell was the only wholesale Packard distributor located in Greater Baltimore, and made sales of Packard cars, parts and accessories at wholesale and retail in Greater Baltimore; that the prices at which Zell acquired cars from Packard for sale by it at retail were higher than the prices at which Zell acquired cars from Packard for sale at wholesale to retail Packard dealers, and were the same as, or about the same as, the prices at which retail Packard dealers acquired cars from Zell; and that the prices at which Zell acquired parts and accessories from Packard for sale at wholesale or retail were lower than the prices at which retail Packard dealers acquired parts and accessories from Zell.

25. Defendants Beck, Porter and Howell state that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 25 of the complaint. Defendant Packard denies each and every allegation contained in paragraph 25 of the complaint.

Answer of Packard Motor Car Company, Marshall Beck, C. M. Porter and Samuel Howell

26. Defendants Beck, Porter and Howell state that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 26 of the complaint. Defendant Packard denies each and every allegation contained in paragraph 26 of the complaint, except that it admits that [2327] during the prewar years in which Zell was a wholesale Packard distributor, Zell, with the knowledge and consent of Packard, selected individuals and concerns to deal in Packard cars, parts and accessories which they could acquire from Zell at prices fixed by Zell; and except that it states that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that such prices were profitable to Zell.

27. State that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 27 of the complaint, except that defendant Packard denies knowledge, permission or encouragement of, or acquiescence, participation or joining in, any of the alleged transactions, acts or practices of Zell asserted in paragraph 27 of the complaint.

28. State that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 28 of the complaint, except that defendant Packard denies knowledge or approval of any of the alleged transactions, acts or practices of Zell asserted in paragraph 28 of the complaint.

29. State that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 29 of the complaint,

except that defendant Packard denies knowledge or approval of any of the alleged transactions, acts or practices of Zell asserted in paragraph 29 of the complaint.

30. State that they are without knowledge or information sufficient to form a belief as to the truth [2328] of any of the allegations contained in paragraph 30 of the complaint, except that they admit that the plaintiff Richard C. Webster was, for years, a Packard salesman for Zell and that in some of those years he sold more new Packards than any other Packard salesman; and that he started a Packard sales and service business which was incorporated under the name of Webster & Machen, Inc. and was a retail Packard dealer under Zell.

31. State that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 31 of the complaint, except that defendant Packard denies consent or approval of any of the alleged transactions, acts or practices of Zell asserted in paragraph 31 of the complaint.

32. State that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 32 of the complaint.

33. State that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 33 of the complaint.

34. Defendants Beck, Porter and Howell state that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations con-

tained in paragraph 34 of the complaint. Defendant Packard denies each and every allegation contained in paragraph 34 of the complaint, except that it states that it is without knowledge or information sufficient to form a belief as to the truth of the allegation as to the [2329] alleged complaint by Zell to Richard Webster or the alleged direction by Zell to Webster.

35. State that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 35 of the complaint.

36. Defendants Beck, Porter and Howell state that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 36 of the complaint. Defendant Packard denies each and every allegation contained in paragraph 36 of the complaint.

37. State that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 37 of the complaint, except that defendant Packard denies knowledge or approval of any of the alleged transactions, acts or practices of Sidney Zell asserted in paragraph 37 of the complaint.

38. Defendants Beck, Porter and Howell state that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 38 of the complaint. Defendant Packard denies each and every allegation contained in paragraph 38 of the complaint, except that it admits that on or about July 8, 1938, Zell sent a notice to the Webster firm that Zell's con-

tract with Webster & Machen, Inc. designating it as a retail Packard dealer would be terminated on August 8, 1938; that the Webster firm brought the matter to the attention of Packard and Packard suggested reconsideration by Zell.

[2330] 39. State that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 39 of the complaint, except that defendant Packard admits that the Webster firm remained a retail Packard dealer under Zell after August 31, 1938, and it denies knowledge of, or acquiescence in, any arrangement embracing any illegal trade-restraining commitment.

40. State that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 40 of the complaint.

41. State that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 41 of the complaint.

42. State that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 42 of the complaint.

43. State that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 43 of the complaint.

44. State that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 44 of the complaint.

Answer of Packard Motor Car Company, Marshall Beck, C. M. Porter and Samuel Howell

[2331] 45. State that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 45 of the complaint.

46. State that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 46 of the complaint, except that they admit that Packard ceased the manufacture of cars for civilian purposes on or about the time of the outbreak of World War II on December 7, 1941.

47. Defendants Beck, Porter and Howell state that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 47 of the complaint. Defendant Packard denies each and every allegation contained in paragraph 47 of the complaint.

48. Deny each and every allegation contained in paragraph 48 of the complaint, except that they admit that Packard resumed the manufacture of cars for civilian use during October 1945; that subsequent to January 1945, Packard entered into Packard Dealer's Sales Agreements providing for automatic termination on dates therein specified, with each of the following: Zell, Webster, DeBaugh Motors, Will Scott, Inc., Schulte Motors, Inc., and Northwestern Motors, Inc.; that the last of such agreements entered into with each of the following terminated automatically on March 31 in the years indicated, respectively: Webster, 1952; DeBaugh Motors, 1952; Will Scott, Inc., 1950; and Northwestern Motors, Inc., 1948; that the last of such agreements entered into with Schulte Motors, Inc.

was cancelled on January 11, 1952 by mutual [2332] agreement; that under such agreements the dealers made purchases, each at the same price, from Packard through its Washington Zone Office, located in Washington, D. C.; and admit and aver that during the postwar years from 1946 through part of 1951, and at all other times, Packard encouraged fair competition between Packard dealers in Greater Baltimore and elsewhere; and state that they are without knowledge or information sufficient to form a belief as to the truth of the allegation that as a result of such encouragement the public was benefited, the plaintiffs made profits, or Zell suffered heavy losses.

49. Deny each and every allegation contained in paragraph 49 of the complaint, except that they admit that the postwar Packard Dealer's Sales Agreements were executed on printed forms prepared by Packard and contained terms which were agreed upon by the parties.,

50. Deny each and every allegation contained in paragraph 50 of the complaint, except that they admit that Packard did not coerce or restrain the plaintiffs prior to 1951, or early in 1952, or at any other time.

51. Deny each and every allegation contained in paragraph 51 of the complaint.

52. Deny each and every allegation contained in paragraph 52 of the complaint.

53. Deny each and every allegation contained in paragraph 53 of the complaint, except that they admit that Webster competed freely with the other Packard dealers,

in Greater Baltimore and elsewhere, including Zell; that during the period commencing in February 1945, Packard, without condition, entered into Packard Dealer's Sales [2333] Agreements with Webster, each of which contained a provision providing for its automatic termination on a date therein specified, and that the last of such agreements entered into with Webster expired on March 31, 1952, by automatic termination; that Packard did not unlawfully restrain trade during the postwar period referred to in the complaint or at any other time; that Zell advised Packard that it could not continue much longer operating at a loss; and except that they state that they are without knowledge or information sufficient to form a belief as to the truth of the allegation that Richard Webster received a salary or dividends from Webster.

54. Deny each and every allegation contained in paragraph 54 of the complaint, except that they admit that in November 1949 Webster's place of business was damaged by fire; that at Webster's instance Packard submitted plans for a building suitable for use as an automobile sales and service property but that Webster procured and used other plans as to which Packard made no criticism; and except that they state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations: concerning the organization of Somerset Realty Company, or concerning its stockholders or its purchase of the real estate; concerning any lease or the terms thereof; or concerning the amount of any investment in the land, building or equipment.

55. Deny each and every allegation contained in paragraph 55 of the complaint, except that they admit that Zell lost money in 1949, 1950, 1951 and in 1952.

Answer of Packard Motor Car Company, Marshall Beck, C. M. Porter and Samuel Howell

56. Deny each and every allegation contained in paragraph 56 of the complaint, except that they admit that [2334] on or about March 4, 1952, Packard notified DeBaugh Motors, Towson, Maryland, that upon expiration, according to its terms, of DeBaugh's Packard Dealer's Sales Agreement on March 31, 1952, it would not be succeeded on April 1, 1952 by a new agreement; that on March 4, 1952, DeBaugh, Webster and Zell were the only individuals or concerns in Greater Baltimore holding Packard Dealer's Sales Agreements.

57. Deny each and every allegation contained in paragraph 57 of the complaint, except that they admit that Packard requested DeBaugh to take down its Packard sign.

58. Deny each and every allegation contained in paragraph 58 of the complaint, except that they admit that DeBaugh's Packard Dealer's Sales Agreement expired on March 31, 1952.

59. State that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 59 of the complaint.

60. State that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 60 of the complaint, except that they deny any knowledge or permission of Packard as to any alleged transactions, acts or practices of Zell asserted in paragraph 60 of the complaint.

61. State that they are without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 61 of the complaint.

62. Deny each and every allegation contained in paragraph 62 of the complaint.

[2335] 63. Deny each and every allegation contained in paragraph 63 of the complaint.

64. Deny each and every allegation contained in paragraph 64 of the complaint.

65. Deny each and every allegation contained in paragraph 65 of the complaint, except that they admit that Richard Webster indicated to Beck and Porter a desire to get out of the Packard business, and they, on their part, indicated that this was in accord with the views of Packard officials in Detroit.

66. Deny each and every allegation contained in paragraph 66 of the complaint, except that they admit that Packard's Zone Office in Washington on February 14, 1952, through defendant Beck, wrote Richard Webster a letter, as follows:

> "Dear Dick:
>
> This will confirm the conference held yesterday with you, Mr. Porter, and the writer in Salisbury, Md.
>
> It was the consensus of opinion that because of the existing circumstances in your Packard Dealership in Baltimore, Md., that your best interests could be served by the liquidation of this dealership, thereby terminating your Packard Franchise. We want you to know, Dick, that Mr. Porter and myself will do everything possible in assisting you to carry out this program.

It was mutually agreed that you would begin now to effect such termination so that it would be completed at the earliest possible time.

In order that we will be able to chart our future in Baltimore, we would like to set July 1, 1952, as the deadline or the latest date for the termination of your Packard Dealer's Sales Agreement.

With very kindest personal regards, I am,

Very truly yours, "

[2336] and except that they admit that Richard Webster replied, under date of February 20, 1952, to the above letter, denying certain statements therein and indicating terms on which he might be willing to liquidate or sell, which reply reads in part as follows:

"'Dear Marshall:

Your letter of February 14, 1952, arrived late Monday afternoon. Because of certain matters which you there discussed, I thought I should reply promptly lest there be any misunderstanding as to whether I would be willing to liquidate the Webster Motor Car Company, and if so, under what circumstances. I did not agree, as your letter intimates to undertake such liquidation.

* * *

As to whether or not I would be willing to liquidate or to sell my interest in the Webster Motor Car Company, I can only say that, depending on price, such an occurance is not beyond the realm of possibility. Naturally, because of its effect upon prospective buyers, I would not UNDER ANY CIRCUMSTANCES attempt to complete such a liquidation or sale by any prearranged date. What price I would

require is too important a decision for me to make without the advice of my auditors, lawyers, and tax advisors. However, it is my feeling that the purchaser would have to agree to lease the York Road property for at least ten years at not less than $750.00 per month, apart from paying dollar for dollar for inventory, fixtures, machinery, etc. My first impression is that since I could assist the purchaser in Packard Sales Policy, a yearly salary of at least $15,000 for no less than ten years would be the type of agreement I should make.

* * *

With very kindest personal regards, I am

Very truly yours,"

67. Deny each and every allegation contained in paragraph 67 of the complaint.

68. Deny each and every allegation contained in paragraph 68 of the complaint.

69. Deny each and every allegation contained in paragraph 69 of the complaint.

[2337] 70. Deny each and every allegation contained in paragraph 70 of the complaint, except that they admit that by April 1, 1952, Webster's Packard Dealer's Sales Agreement had expired.

71. Deny each and every allegation contained in paragraph 71 of the complaint, except that they admit that on or about April 3, 1952, Beck and Porter offered Webster a Packard Dealer's Sales Agreement with a July 1, 1952, expiration date, containing a new standard printed clause covering repurchase of parts, which Richard Webster refused.

Answer of Packard Motor Car Company, Marshall Beck, C. M. Porter and Samuel Howell

72. Deny each and every allegation contained in paragraph 72 of the complaint, except that they admit that in a letter dated April 15, 1952, plaintiffs' attorney advised that he had been retained to press action under the Anti-Trust Acts against Packard and Zell.

73. Deny each and every allegation contained in paragraph 73 of the complaint, except that they admit that on or about April 18, 1952, Porter and Howell, on behalf of Packard, submitted to Harry French, President and General Manager of plaintiff corporation, and as such authorized to enter into all contracts in its behalf, what they told him and what in fact was, a Packard Dealer's Sales Agreement for the ensuing year, from April 1, 1952 to March 31, 1953, and attempted to persuade him to sign; that French refused to sign this, and, as was the custom in such cases, Porter and Howell left without leaving a copy of the proffered agreement; that they did not notify Richard Webster; they further admit and aver that it was customary procedure, with which French was familiar, for Packard to sign upon receipt from the dealer of his signature on the signature page of the printed form of Amendment [2338] to Packard Dealer's Sales Agreement, which Amendment made reference to, and amendment of, the provisions in the expired printed agreement in the dealer's possession; the printed form of Amendment to Packard Dealer's Sales Agreement for 1952-1953 consisted of three printed sheets, the first two of which were stapled together, and the third, or signature sheet, was separate; this separate sheet was handed to Harry French for signature, as was the standard practice with the dealers; he did not ask for the first two printed sheets, which would have been supplied had he asked. Defendants further admit and aver that about four days later

there was tendered to, and left with Webster for acceptance and signature, a complete standard form of "1952-1953 Amendment to Packard Dealer's Sales Agreement" the effect of which, if executed, would have been to extend Webster's Packard Dealer's Sales Agreement to March 31, 1953.

74. Admit the allegations contained in paragraph 74 of the complaint.

75. Deny each and every allegation contained in paragraph 75 of the complaint, except that they admit that on June 11, 1952, plaintiffs' attorney wrote the letter to Packard set forth in paragraph 75 of the complaint and that Packard's reply to said letter was as is set forth in said paragraph of the complaint.

76. Deny each and every allegation contained in paragraph 76 of the complaint, except that they admit and aver that damage, if any, resulting from discontinuance of Webster's Packard business was by reason of plaintiffs' own deliberate decision to refuse the standard 1952-1953 Packard Dealer's Sales Agreement.

[2339] 77. Deny each and every allegation contained in paragraph 77 of the complaint.

78. Deny each and every allegation contained in paragraph 78 of the complaint.

79. Deny each and every allegation contained in paragraph 79 of the complaint.

80. Deny each and every allegation contained in paragraph 80 of the complaint.

Answer of Packard Motor Car Company, Marshall Beck, C. M. Porter and Samuel Howell

81. Deny each and every allegation contained in paragraph 81 of the complaint.

82. Deny each and every allegation contained in paragraph 82 of the complaint.

[3258] SIXTH DEFENSE*

On or about March 31, 1955, plaintiffs commenced an action in the United States District Court for the District of Maryland, hereinafter referred to as the "Maryland action", against Zell Motor Car Company, Sidney Zell, O. Englar Gilbert, J. Jackson Smith, G. Dale Proctor and Joseph Janin, all of whom are named as defendants in the present action. The claim sought to be asserted in the complaint in the Maryland action is the same as that sought to be asserted in the present action. [3259] Plaintiffs' attorneys in the Maryland action are William E. Leahy and William J. Hughes, Jr., their attorneys in the present action, and Donald D. Webster, who is the son of the individual plaintiff and vice president and a director of the corporate plaintiff. On April 29, 1955, on consent of the attorneys for the respective parties in the Maryland action, there was entered in that action an order of the United States District Court for the District of Maryland, a copy of which is annexed hereto as Exhibit A [printed as Defendants' Exhibit 25B] and made a part hereof. That order provided for the dismissal of the Maryland action as to all of the defendants therein, with prejudice, upon the disposition of the present action in or by this Court (including, without limitation, by settlement, order, directed verdict or verdict of the jury), other than by a decision and order by this Court that it lacks jurisdiction over the present action. After

*The Sixth Defense was added to the answer by amendment allowed in open court on May 26, 1955.

the entry of such order, plaintiffs made a motion in the Maryland action to vacate or modify such order on the ground that the order might operate as a release of the defendants in the present action. The motion was denied. By reason of the foregoing, defendants herein have been released, in whole or in part, from any and all liability on each and every claim sought to be asserted in the complaint in the present action.

[2339] WHEREFORE, defendants PACKARD MOTOR CAR COMPANY, MARSHALL BECK, C. M. PORTER and SAMUEL HOWELL pray that the complaint be dismissed and that they be awarded their costs and disbursements of this action and such other and further relief as to the Court may seem just and proper in the premises.

Dated, March 9, 1953.

HUGHES, HUBBARD, BLAIR & REED
One Wall Street
New York 5, N. Y.
WHitehall 3-6500

By LEIGHTON HOMER SURBECK

WILKINSON, BOYDEN, CRAGUN & BARKER
744 Jackson Place, N.W.
Washington 6, D. C.
NAtional 8-1114

By JOHN W. CRAGUN

Attorneys for:
PACKARD MOTOR CAR COMPANY
MARSHALL BECK
C. M. PORTER and
SAMUEL HOWELL

[2401] (Filed Apr. 23, 1954)

Plaintiffs' Interrogatories to Defendant Packard Motor Car Company

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Plaintiffs propound the following interrogatories [2402] to defendant, Packard Motor Car Company, to be answered by its president or other officer or agent after making such inquiry of this defendant's officers, employees, dealers and agents, and such examination of its and their books, records and papers, as may be necessary to furnish such information in answer to the interrogatories as is available to this defendant.

At various places throughout the interrogatories the words "Webster", "Packard", "Zell", "Schulte" and "De Baugh" are used. It is to be understood that according to the context in which they are used "Webster" refers to the Webster Motor Car Company and or its officers, employees and agents or to Richard C. Webster; that "Packard" refers to Packard Motor Car Company and or its officers, employees, dealers and agents; that "Zell" refers to Zell Motor Car Company and or its officers, employees and agents or to Sidney Zell; that "Schulte" refers to Schulte Motor Sales, Incorporated and or its officers, employees and agents or to William Schulte; that "De Baugh" refers to De Baugh Motors and or its officers, employees and agents, or to Franklin De Baugh.

* * *

[2405] 13. Did Packard cooperate with Schulte in seeking to obtain someone who would take over his franchise?

* * *

16. Is Exhibit 3 hereof a correct extract from a report from E. H. Platfoot to C. E. Briggs on the subject of Zone and Dealer Contacts dated September 24, 1951?

Plaintiffs' Interrogatories to Defendant Packard Motor Car Company

17. Was the agreement between Platfoot and Zell which is described in Exhibit 3 approved by Packard?

a. Was the substance of this agreement ever revealed to Schulte?

* * *

[2406] 26. Is Exhibit 7 hereof a correct copy of a letter from Sidney Zell to Clare E. Briggs dated February 13, 1952?

27. If your answer to the preceding interrogatory is in the affirmative

a. State who was present at the meeting in New York on January 29th which is referred to in the first paragraph?

b. State how the meeting was arranged.

c. State fully and in detail what was discussed at the meeting and in particular whether Webster and/or DeBaugh were discussed and in what way.

* * *

[2407] 28. Marshall Beck testified in his deposition that he had a meeting with Richard C. Webster in Salisbury, Maryland, on February 13, 1952 at which there was discussion with respect to the continuation or ending of the Webster's franchise. Please state with reference to this meeting——

a. What was the purpose or reason for the trip to Salisbury?

b. As of February 13, 1952, had Packard concluded that it had any basis for cancelling the franchise

of Webster for cause within the provisions of the franchise agreement; if so, state what were the grounds for such action, and when, where and between whom they had been discussed prior to February 13, 1952.

c. Did Packard at any time after April 1, 1951 ever state or suggest to Webster that the conduct of the Webster business was or might be treated as a basis for cancellation or non-renewal of Webster's franchise? If so, state the circumstances in detail.

[2408] d. Please state fully and in detail any and all circumstances in connection with Webster's Packard business in Baltimore which in Packard's opinion, formed prior to February 14, 1952, indicated that Webster's best interests would be served by liquidation of his leadership.

* * *

30. Is Exhibit 9 hereof a correct copy of a letter dated February 20, 1952 received by Marshall Beck from Richard C. Webster.

31. If your answer to the preceding interrogatory is in the affirmative, please state whether any response was made by Packard to the request in the fourth paragraph of Exhibit 9 for a report by Packard on any manner in which Webster's performance was regarded as weak or unsatisfactory.

* * *

33. Were the contents of Exhibit 9 ever made known to the Packard home office in Detroit; if so, to whom, when, how and why?

* * *

35. If your answer to the preceding interrogatory is in the affirmative, state what course of action was decided upon, and how and when it was communicated to Beck. If it was [2409] communicated in writing, please attach copies of all the relevant documents or state when and where they may be examined by counsel.

* * *

38. At the meeting in New York on January 29, 1952, (referred to in Exhibit 7) was there any discussion with respect to the dealership of DeBaugh Motors in Towson, Maryland? If so, state the conversation fully and in detail.

39. When and by whom and for what reasons was it decided to terminate the franchise of DeBaugh Motor?

* * *

43. Was the termination or non-renewal of the DeBaugh franchise related to the requests of Zell as to the handling of Packard business in metropolitan Baltimore? If so, set forth the relationship in full detail.

* * *

[2410] 46. Is the document hereto annexed as Exhibit 13 dated "3-1-52" on a memorandum pad of F. L. Armstrong a correct copy of a communication from Mr. Armstrong to Mr. Abernethy.

* * *

[2411] 48. If your answer to interrogatory 46 is in the affirmative, state

* * *

d. What was the reason for requesting Mr. Abernethy to destroy Mr. Armstrong's memorandum?

Plaintiffs' Interrogatories to Defendant Packard Motor Car Company

49. Is Exhibit 14 hereof a correct copy of a letter from Webster to Beck dated March 9, 1952?

50. If your answer to the preceding interrogatory is in the affirmative, please

a. State whether this letter was forwarded or its contents made known to anyone in Packard's home office; and if so, when, how and to whom? If it was forwarded with an accompanying letter, please attach a copy of it, or state where it may be examined by counsel.

b. State whether anyone on behalf of Packard ever acknowledged or in any way responded in writing to Webster's letter of March 9, 1952?

* * *

[2412] 51. Is Exhibit 15, hereof, a correct copy of a report of C. M. Porter dated March 18, 1952?

52. If your answer to the preceding interrogatory is in the affirmative, please

a. State when and where the meeting occurred, who was present, and what was said.

* * *

55. Was any agreement, arrangement or understanding arrived at at any time between Packard and Zell with respect to the termination of the DeBaugh franchise in 1952?

* * *

[2414] 59. Following receipt by Mr. Penn of Zell's letter of March 21, 1952 (Exhibit 17 hereof), was there

any discussion either orally, or through exchange of written communications, between Packard representatives with respect to the matters referred to in Zell's letter?

60. If your answer to the preceding interrogatory is in the affirmative, state the time and place of all oral discussions and who was present and what was said; and if there was an exchange of documents, please attach copies or state where they may be examined by counsel.

61. On Zell's letter to Fenn of March 21 (Exhibit 17 hereof), there is a pencil endorsement under date of "4/1/52" reading—"Advised Beck by telephone to try and get cancellation 7/1/52 amendment signed by Webster". Please state who made the [2415] pencil notation. Give the date of the telephone conversation, who talked and what was said?

62. On the letter from Zell to Fenn of March 21, 1952 (Exhibit 17 hereof), there is a further pencil notation—"Discussed with C. E. B". Whose initials follow this note? Who is referred to by the initials C. E. B. What was his position? When did the discussion occur. Who was present, and what was discussed and decided?

63. Was any reply, oral or written, made to Zell's letter of March 21, 1952 (Ex. 17)? If the reply was oral, when, where and by whom, and what was said? If in writing, attach a copy or state where it may be examined by counsel.

* * *

[2416] 69. Did Mr. Beck and C. M. Porter and Ben Marnocha, all of Packard, interview Richard Webster at Deals Island, Maryland on April 3, 1952?

Plaintiffs' Interrogatories to Defendant Packard Motor Car Company

70. If your answer to the preceding interrogatory is in the affirmative, please state

a. By whose order or direction these men went to Deals Island for the interview?

b. What was their entire purpose in going?

c. What were their instructions; from whom had they received them, and how had they been transmitted?

d. Was anything said to Webster at the meeting that any commitments had been made; and if so, what was said?

e. Was it stated to Webster at that meeting that Packard had definitely and finally decided that the Webster franchise should be terminated?

f. If so, was any reason given to Webster for Packard's decision, and if so what was it?

71. Did Marshall Beck receive on or about April 15, 1952 a letter from William E. Leahy, a copy of which is Exhibit 19 hereto attached?

72. Was Mr. Leahy's letter brought to the attention of the Packard Company in Detroit; and if so when, how and to whose attention?

* * *

74. Following the receipt of Mr. Leahy's letter (Exhibit 19) in Detroit, were there any discussions among Packard representatives as to what should be done with respect to Webster?

Plaintiffs' Interrogatories to Defendant Packard Motor Car Company

[2417] 75. If your answer to the preceding question is in the affirmative, please state when and where the discussions occurred, who was present, and what was said? If the discussions and the conclusions were documented in any way, please attach copies of the documents or state where they may be examined by counsel?

* * *

[2419] 88. Is Exhibit 24 hereof a correct copy of a receipt of E. L. Armstrong for "Complete File on Webster Cancellation"?

89. If your answer to the preceding interrogatory is in the affirmative, please state

a. Who assembled the file?

[2420] b. Where the file was up to the time of its delivery to Armstrong?

c. By whose direction or upon whose request was it given to Armstrong?

d. For what purpose was it given to Armstrong?

e. List the papers in the file.

f. What did Armstrong do with the file and the papers therein?

g. What is the present location of the file or its contents?

* * *

93. Following the meeting of May 20, 1952, were any discussions held between Packard representatives and/or Zell as to what further action should be taken?

Plaintiffs' Interrogatories to Defendant Packard Motor Car Company

94. If your answer to the preceding interrogatory is in the affirmative, state when and where the discussions occurred, who was present, what was discussed, and what was decided?

[2421] 95. Is Exhibit 25 hereof a correct copy of a letter dated June 4, 1952 sent by Marshall Beck to Webster?

96. If your answer to the preceding interrogatory is in the affirmative, was that letter sent at the direction of F. L. Armstrong?

* * *

[2423] 109. Please give the names of the franchised Packard dealers in metropolitan Baltimore, Maryland and in metropolitan Washington, D. C., each calendar year from 1948 through 1953, and next to each dealer for each calendar year, place the dollar volume of new Packard cars, of parts and of accessories which the dealer purchased that year from Packard.

* * *

[2438] 200. How did Packard's setting up of its Washington Zone Office and its termination of Zell's distributorship franchise affect Zell?

201. Describe the changes which were effected by the termination of Zell's distributorship, insofar as Zell was concerned?

203. After the Washington Zone Office was set up where did Packard store the cars, parts and accessories which it sold to Baltimore dealers?

205. When the Washington Zone Office was established, what Baltimore franchised dealers were there?

* * *

[2439] 212. Isn't it true that three of Packard's reasons for establishing the Washington Zone Office were (1) that it believed it would sell more cars, parts and accessories under a Zone Office-Multiple Dealership System than under the distributorship system; (2) that it would afford better representation and service to Packard owners in the Baltimore area if it eliminated the restraints which Zell had exercised pre-war over its sub-dealers; and (3) that it would be able to make more money in distributing Packard cars, parts and accessories to the Baltimore dealers directly from its Washington [2440] Zone Office rather than through the Zell distributorship? If this is not true, please state the reasons for your negative answer.

* * *

215. How many Packard dealers were there in Baltimore during the post-war years from 1945 through 1951? List them with dates when they became or ceased to be franchised Packard dealers.

216. Is it true that one of the complaints or grievances which Zell had concerning the other Packard dealers in Baltimore during the post-war period was that they afforded too much competition for Zell?

217. Is it true that one of the complaints or grievances which Zell had concerning the other Packard dealers in

Baltimore during the post-war period was that they were getting business which Zell might otherwise have gotten because they were allowing more for the used car offered in trade than Zell could or was willing to offer (in other words, over-allowances)?

218. Did Zell ever state that the other Baltimore Packard dealers in Baltimore had a competitive advantage because of their lower overhead and/or fixed expenses? If so, when and about whom?

* * *

[2441] 221. If and when Packard received complaints or criticisms by Zell during the post-war period prior to 1952, that Packard had too many Packard dealers in Baltimore or that one or more of the Packard dealers was allowing too much for the used cars offered in trade on new Packards, did Packard, in writing or orally, ever recommend to Zell during this period that Zell cut its overhead and/or fixed expenses? If so, when; what Packard employees made such recommendations; and what did Zell do in response thereto?

222. Did Packard ever recommend to Zell in response to such criticisms or complaints that Zell liberalize or relax its trade-in allowance policy for the purpose of giving higher trade-in allowances and obtaining larger volumes of new car sales? If so, when; what Packard employees made such recommendations; and what were Zell's replies or responses thereto?

* * *

[2803] (Filed Jan. 10, 1955)

Answers to Interrogatories

Defendant Studebaker-Packard Corporation, formerly Packard Motor Car Company, hereinafter referred to as "defendant", without waiving the right to make any objection with respect to relevancy or materiality of any statement hereinafter made, or any part thereof, answers interrogatories served upon it by plaintiffs on April 22, 1954 as follows:

* * *

[2805] 13. C. M. Porter, an employee of Packard, interviewed prospective purchasers of Schulte's assets, who were also prospective applicants for a Dealer's Sales Agreement.

* * *

[2806] 16. Yes.

17. There was no such agreement. Mr. Platfoot's decision not to replace Schulte, which is described in Exhibit 3, was approved by defendant.

17a. So far as defendant knows, the decision was not revealed to Schulte.

* * *

26. Yes.

27a. Sidney S. Zell, Marshall G. Beck, Clare E. Briggs, Roy Abernethy, Leo E. Fenn and Leroy Spencer.

27b. By telephone conversations between Sidney S. Zell and Marshall G. Beck and between Marshall G. Beck and Roy Abernethy and by letter which is Exhibit 6.

[3050] 27c. Mr. Zell stated that he had been unable to get sufficient volume and had been losing money; that the owner of premises which he leased for a service station was pressing for a renewal and he had to let the owner know about renewal but he refused to sign a new lease until he had had an opportunity to talk with Packard; that he would not continue doing business for Packard in the red and if he were not made sole dealer in Baltimore he would have to quit; that he was confident that if made sole dealer in Baltimore he could improve Packard's price class position there and satisfy Packard's demands in Baltimore and he requested an opportunity for a trial period to demonstrate his ability to do so; that in order to obtain a larger percentage of price class in Baltimore he would augment and strengthen his organization and facilities and increase trade-in allowances. The Packard representatives inquired as to Mr. Zell's general set-up, how many employees he had and what he thought he could do if given the opportunity. The Packard representatives told Mr. Zell Packard would take his request under consideration and notify him of its decision. Mr. Zell requested notification within two weeks. Neither Webster nor DeBaugh was discussed.*

* * *

[2808] 28a. To discuss termination of Webster's dealership.

28b. No.

28c. Defendant does not know. It has been unable, by file search or inquiry of its employees, to obtain the information called for.

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*As amended Mar. 18, 1955.

Answers to Interrogatories

28d. Defendant knows of no such opinion.

* * *

30. Yes.

31. Not so far as defendant knows.

* * *

33. Yes. Mr. Beck sent a copy of the letter to Mr. Abernethy on or about February 25, 1952 to inform him of its contents.

* * *

[3050] 35. To offer Webster a renewal amendment of its Dealer's Sales Agreement with a July 1, 1952 termination date and, if Webster should refuse to accept this, to offer Webster a renewal amendment with a March 31, 1953 termination date. This was communicated to Mr. Beck by Mr. Abernethy and Mr. Armstrong by telephone between March 5, 1952 and April 3, 1952. Defendant has been unable, by file search or inquiry of its employees, to fix the time more definitely.*

* * *

[2809] 38. No.

39. The failure to renew DeBaugh's Dealer's Sales Agreement was a consequence of defendant's decision to comply with Mr. Zell's request described in the answer to Interrogatory 27c. The decision was made by C. E. Briggs between January 29, 1952 and February 11, 1952.

* * *

43. Yes. It was a consequence of defendant's decision to comply with Mr. Zell's request described in the answer to Interrogatory 27c.

* * *

*As amended Mar. 18, 1955.

[2810] 46. Yes.

* * * *

[2811] 48d. A belief that the memorandum might be evidence of a contractual commitment to renew on April 1, 1952.

49. Yes.

50a. Yes. Defendant believes that Mr. Beck forwarded this letter or a copy thereof to Mr. Abernethy shortly after the receipt the eof.

50b. Not so far as defendant knows.

51. Yes.

[3051] 52a. Defendant does not know. The only information on the subject which defendant has is contained in Exhibit 15. Defendant has been unable, by file search or inquiry of its employees, to obtain additional information on the subject.*

* * *

[2811] 55. No.

* * *

[2812] 59. Yes.

[2813] 60. Shortly following receipt of the letter, there were one or more oral discussions between Messrs. Armstrong and Briggs, and possibly among Messrs Armstrong, Briggs and Abernethy, as to whether Packard should comply with Mr. Zell's request for a letter. It was decided not to do so in view of Packard's inability to determine at that time whether a renewal amendment would be signed with

*As amended Mar. 18, 1955.

Webster in 1953 and in view of Packard's policy not to make collateral agreements with dealers.

61. Mr. Abernethy. The telephone conversation was on or about April 1, 1952. Defendant has been unable, by file search or inquiry of its employees, to obtain the other information called for.

62. Mr. Abernethy's. "C. E. B." refers to Clare E. Briggs, who was General Sales Manager. The discussion and decision are described in the answer to Interrogatory 60.

63. Not so far as defendant knows.

* * *

69. Yes.

[2814] 70a. Marshall G. Beck's.

70b. So far as defendant knows, their entire purpose was to offer Webster a renewal amendment of its Dealer's Sales Agreement with a July 1, 1952 termination date.

70c. Mr. Abernethy and Mr. Armstrong had instructed Mr. Beck by telephone to offer Webster a renewal amendment of its Dealer's Sales Agreement with a July 1, 1952 termination date.

[3052] 70d. Mr. Beck stated to Mr. Webster that he had made certain commitments and had to live up to them.*

70e. Defendant does not know. The only information on the subject which defendant has, in addition to a type-

*As amended Mar. 18, 1955.

written memorandum of Mr. Beck dated April 4, 1952 and a letter from Mr. Beck to Mr. Abernethy dated April 7, 1952, which have been produced by defendant pursuant to the stipulation dated June 18, 1953, is the testimony thereon in the deposition of Marshall G. Beck, who no longer is in defendant's employ. Defendant has been unable, by file search or inquiry of its employees, to obtain additional information on the subject.*

70f. Defendant does not know. The only information on the subject which defendant has, in addition to a typewritten memorandum of Mr. Beck dated April 4, 1952 and a letter from Mr. Beck to Mr. Abernethy dated April 7, 1952, which have been produced by defendant pursuant to the stipulation dated June 18, 1953, is the testimony thereon in the deposition of Marshall G. Beck, who no longer is in defendant's employ. Defendant has been unable, by file search or inquiry of its employees, to obtain additional information on the subject.*

[2814] 71. Yes.

[2815] 72. Yes. Mr. Beck read the letter to Mr. Armstrong over the telephone shortly after its receipt and subsequently sent the letter or a copy thereof to Mr. Armstrong.

* * *

74. Yes.

[3053] 75. Following receipt of the letter, Messrs. Armstrong, Abernethy and Briggs discussed the Webster situation in Detroit. It was assumed that what Webster

*As amended Mar. 18, 1955.

wanted was a renewal amendment of its Dealer's Sale Agreement and that if one were offered the matter would be at an end. It was decided that the matter should be treated as a commercial rather than a legal matter and that Messrs. Armstrong and Abernethy should endeavor to have a renewal amendment signed. Paragraph 5 of the order entered herein December 10, 1954 provides that whenever any interrogatory inquires where documents may be examined by counsel it is to be construed as meaning where the document is located. All documents in defendant's possession the location of which defendant is required to state are at the office of Wilkinson, Boyden, Cragun & Barker, 744 Jackson Place, Washington, D. C.*

* * *

[2816] 88. Yes.

89a. Defendant believes that Mr. Beck or some member of his staff did.

89b. In the Washington Zone office.

89c. Mr. Armstrong's.

89d. For examination of the file by Messrs. Abernethy and Armstrong prior to a conference at the office of plaintiffs' attorney on May 20, 1952 and for possible reference at that conference.

89e. Defendant has been unable, by file search or inquiry of its employees, to obtain the information called for.

89f. Messrs. Abernethy and Armstrong examined the file. Defendant believes that Mr. Armstrong returned the file to Mr. Beck.

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*As amended Mar. 18, 1955.

89g. The file no longer is in existence as a file, but defendant believes that the documents contained therein are among those reviewed in connection with production pursuant to stipulation and court order.

* * *

[2817] 93. Yes.

94. Messrs. Abernethy, Armstrong and Beck discussed the action of Mr. Donald Webster at the conference and their impression of him. Mr. Beck was instructed to let Messrs. Abernethy and Armstrong know if and when Webster executed and returned the renewal amendment. Messrs. Abernethy and Armstrong told Mr. Beck that they expected that the renewal amendment probably would be received, if at all, within a week because that would give Mr. Donald Webster time to consult the Webster Board of Directors, as he said that he was going to do. Nothing was decided. When they returned to Detroit following the conference, Messrs. Abernethy and Armstrong reported to Mr. Briggs on what had occurred in Washington. On or about June 4, 1952, Mr. Armstrong, by telephone, instructed Mr. Beck to send Webster the letter dated June 4. 1952 produced by defendant pursuant to the stipulation dated June 18, 1953. On or about June 10, 1952, Mr. Briggs instructed Mr. Armstrong to telephone Mr. Zell that Packard could not comply with his request for a letter. On or about June 11, 1952, Mr. Beck informed Mr. Armstrong by telephone that he had not received a renewal amendment signed by Webster and that the Washington Zone office would proceed with the transactions after termination pursuant to Webster's Dealer's Sales [2818] Agreement. On or about June 11, 1952, on the telephone, Mr. Beck read to Mr. Armstrong the letter dated June 11, 1952 from Mr. Leahy to Mr. Beck and Mr. Armstrong dictated to Mr. Beck a reply thereto to be sent by Mr. Beck to Mr. Leahy.

95. Yes.

96. Yes.

* * *

[3120] 109. The answer to this interrogatory, to the extent that defendant is able to give it, is set forth in the tabulation below. Defendant has no records containing the figures called for. Approximate figures, compiled from various invoices, ledgers, sales summaries and a cash receipts journal, are set forth below. No figures are available for certain periods and, as indicated below, estimates for those periods have been made.

	1948		
Baltimore	**Cars**	**Parts[1]**	**Access.[2]**
Zell	$ 644,596	$ 79,033	$ 12,308
Webster	290,549	23,548	3,892
Will Scott	273,672	20,060	3,716
Northwestern	30,496	2,575	992
DeBaugh	5,477	3,323	88
Washington			
Haleys	575,581	72,417	9,732
Loring Motors	612,119	68,115	13,841
Winchester Inc.	204,690	14,698	7,949
Hicks Motor Co.	235,109	11,091	7,033
Capitol Motor Co.	418,040	21,674	7,145
Spurrier Motors	240,739	25,992	5,086
Covington Motors	281,293	13,374	3,136
Royal Motors	251,636	12,901	9,117
Follins Service	117,763	7,632	2,217

[1]No figures are available for December. An estimate consisting of 1/11 of the total sales for the other 11 months is included to give an estimated 12 months' total.

[2]No figures are available for January, February or December. An estimate consisting of 1/3 of the total sales for the other 9 months is included to give an estimated 12 months' total.

[3121]

Baltimore	1949 Cars	Parts	Access.
Zell	$ 725,335	$ 63,092	$ 19,008
Webster	355,250	15,712	7,858
Will Scott	248,168	29,804	3,737
Schulte	197,266	4,030	3,670
DeBaugh	20,159	780	285
Washington			
Haleys[1]	612,465	41,815	9,613
Loring Motors	463,717	32,296	9,055
Winchester Inc.	228,625	12,765	3,070
Hicks Motor Co.	395,832	10,350	7,275
Capitol Motor Co.	434,766	18,228	8,647
Spurrier Motors	235,019	12,050	6,015
Covington Motors	341,664	9,245	4,132
Royal Motors	296,566	11,750	5,722
Follins Service	157,763	6,621	1,888

[1]Through November.

Baltimore	1950 Cars	Parts	Access.
Zell	$ 618,968	$ 35,772	$ 10,260
Webster	254,120	17,886	3,050
Will Scott	30,878	4,009	576
Schulte[1]	206,709	5,035	1,979
DeBaugh	30,811	3,046	717
Washington			
Haleys	—	—	323
Loring Motors	469,606	64,628	9,042
Winchester Inc.	386,338	19,995	6,064
Hicks Motor Co.	303,904	17,444	5,713
Capitol Motor Co.	495,506	14,247	7,842
Spurrier Motors	243,320	14,231	3,898
Covington Motors	518,364	10,127	5,793
Royal Motors[2]	134,141	1,895	2,465
Follins Service	93,708	4,750	2,466

[1]Through November.
[2]Through June.

1951

Baltimore	Cars	Parts	Access.
Zell	$ 574,412	$ 55,241	$ 5,930
Webster	347,254	25,206	2,045
Schulte[1]	159,243	6,612	2,697
DeBaugh	27,182	1,382	461

[3122]

Washington			
Winchester Inc.	228,052	17,004	1,345
Spurrior	278,155	21,693	2,706
Capitol Motor Co.	466,511	21,524	5,101
Hicks Motor Co.	242,532	14,568	4,490
Loring Motors	444,837	60,184	4,912
Covington Motor Co.	493,637	17,064	2,231
College Park	178,935	5,120	2,867
McNey Kelbough	95,435	4,018	1,187

[1]Through November.

1952

Baltimore	Cars	Parts	Access.
Zell	$ 918,115	$ 66,262	$ 14,722
Webster	138,698	13,461	1,746
Schulte	—	142	112
DeBaugh	9,447	634	135

Washington			
Winchester Inc.	199,657	9,691	4,314
Spurrior[1]	323,910	8,822	1,312
Capitol Motor Co.	408,606	25,968	6,697
Hicks Motor Co.	264,295	18,153	7,298
Loring Motors[2]	24,768	10,154	634
Covington Motor Co.	752,183	19,472	14,158
College Park	143,544	6,178	3,005
McNey Kelbough	411,197	22,938	6,857
O'Brien Rohall Inc.[3]	234,012	23,760	4,770

[1]Through March.
[2]Through March.
[3]April through December.

	1953		
Baltimore	**Cars**	**Parts**	**Access.**
Zell	$1,277,410	$ 86,990	$ 7,945
Washington			
Winchester Inc.[1]	134,145	4,105	1,343
Capitol Motor Co.	268,021	24,819	2,703
Hicks Motor Co.	151,578	7,730	1,765
Covington Motor Co.	471,975	19,852	3,884
College Park	215,983	8,717	2,094
McNey Kelbough	252,927	26,237	3,089
Dalten Burrell	13,658	2,783	50
O'Brien Rohall Inc.	346,468	38,490	3,209
Central Motor Co.[2]	134,343	2,105	840

[1]Through May.
[2]June through December.*

*As amended Apr. 25, 1955.

* * *

[2822] 200. Zell became a dealer under a Dealer's Sales Agreement instead of a distributor under a Distributor's Sales Agreement.

201. Zell ceased to be a distributor under a Distributor's Sales Agreement.

203. In the Washington Zone warehouse and various locations in and around Washington, D. C., as well as in Detroit.

205. Zell was a distributor in Baltimore and Zell's dealers in Baltimore were Claude R. Milburn, Inc., Northwestern Motors, Inc., Will Scott, Inc. and The Webster Motor Car Company.

* * *

212. (1) Defendant believed that it would sell mo cars, parts and accessories under the new arrangemen (2) No. (3) Defendant believed that it would be able t make more money under the new arrangement.

* * *

215. Five. Northwestern Motors, Inc., 9/1/44 3/31/48; Schulte Motor Sales, Inc., 5/27/49-1/11/52 Will Scott, Inc., 9/1/44-3/31/50; The Webster Motor Ca [2823] Company, 9/1/44-6/11/52; Zell Motor Car Com pany, 9/1/44 to date.

216. Not so far as defendant knows.

217. Not so far as defendant knows.

218. Not so far as defendant knows.

* * *

221. Not so far as defendant knows.

222. Not so far as defendant knows.

* * *

[3102] (Filed Mar. 29, 1955)

Stipulation of Facts

1. In this stipulation, Packard Motor Car Company i referred to as "Packard", the Webster Motor Car Company is referred to as "Webster" and Zell Motor Car Company is referred to as "Zell".

2. The dealers appointed by Packard in Baltimore from 1944 through 1951 and the date when each was appointed were as follows:

Dealer	Appointed
Zell	9/1/44
Webster	9/1/44
Northwestern Motors, Inc.	9/1/44
Will Scott, Inc..	9/1/44
Schulte Motor Sales, Inc.	5/27/49

Northwestern Motors, Inc. ceased to be a dealer 3/31/48. Will Scott, Inc. ceased to be a dealer 3/31/50. Schulte Motor Sales, Inc. ceased to be a dealer 1/11/52. Franklin DeBaugh was a Packard dealer in Towson, Maryland, from some time in 1946 to some time in 1948 and from some time in 1950 to March 31, 1952.

3. The dealers other than Webster referred to in paragraph 2 had agreements with Packard made on the same Packard Dealer's Sales Agreement printed form prepared by Packard as that on which Webster's Dealer's Sales Agreement was made.

[3103] 4. The dealers referred to in paragraph 2 purchased most of their Packard cars, parts and accessories from Packard.

5. On January 29, 1952, there was a conference in the Waldorf-Astoria Hotel in New York City. Those present were Sidney S. Zell and the following Packard employees: Leroy Spencer, Executive Vice President; Clare E. Briggs, General Sales Manager; Roy Abernethy, Assistant General Sales Manager in Charge of Eastern Division; Leo E. Fenn, Eastern Division Sales Manager, and Marshall G. Beck, Washington Zone Manager.

6. On or about February 11, 1952, there was a telephone conversation between Sidney S. Zell and Marshall

G. Beck, Packard's Washington Zone Manager, which was followed, on the same day, by one or more telephone conversations between Mr. Beck and Roy Abernethy, Packard's Assistant General Sales Manager in Charge of Eastern Division, and by a further telephone conversation between Mr. Beck and Mr. Zell.

7. On February 12 or 13, 1952, there was a conference at Salisbury, Maryland. Those present were plaintiff Richard C. Webster and the following Packard employees: Marshall G. Beck, Washington Zone Manager, and Clifford M. Porter, City Manager for Washington, D. C. and Baltimore, Maryland.

8. On February 29, 1952, there was a conference at Zell's place of business in Baltimore, Maryland. Those present were Sidney S. Zell, G. Dale Proctor, and the following Packard employees: Leo E. Fenn, Eastern Division Sales Manager, and Marshall G. Beck, Washington Zone Manager.

9. The standard 1952-1953 one-year renewal amendment to the standard Packard Dealer's Sales Agreement was not submitted to either Webster or DeBaugh for signature before April 1, 1952.

[3104] 10. On April 3, 1952, there was a conference at Deal Island, Maryland. Those present were plaintiff Richard C. Webster and the following Packard employees: Marshall G. Beck, Washington Zone Manager; Clifford M. Porter, City Manager for Washington, D. C. and Baltimore, Maryland; and Ben Marnocha, Washington Zone Business Manager.

Stipulation of Facts

11. On April 22, 1952, Packard delivered to Webster, for signature by Webster, the standard form, filled out for Webster, for the 1952-1953 one-year renewal of the standard Packard Dealer's Sales Agreement. Webster did not sign such form.

12. In or about April, 1952, Sidney S. Zell conferred with Clare E. Briggs, Packard General Sales Manager, at the Shoreham Hotel in Washington, D. C.

13. On May 6, 1952, there was a conversation between William E. Leahy, plaintiffs' attorney, and Marshall G. Beck, Packard's Washington Zone Manager.

14. On May 20, 1952 there was a conference in the office of William E. Leahy, in Washington, D. C. Those present were Donald D. Webster, Vice President and a director of Webster; William E. Leahy and William J. Hughes, Jr., plaintiffs' attorneys; and the following Packard employees: Roy Abernethy, Assistant General Sales Manager in Charge of Eastern Division; F. L. Armstrong, Administrative Assistant Field Sales Manager; Marshall G. Beck, Washington Zone Manager; and Clifford M. Porter, City Manager for Washington, D. C., and Baltimore, Maryland.

15. On June 9, 1952, there was a conference in Washington. Those present were William E. Leahy, plaintiffs' attorney, and the following Packard employees: Marshall G. Beck, Washington Zone Manager, and Clifford M. Porter, City Manager for Washington, D. C., and Baltimore, Maryland.

16. On or about June 10, 1952, there was a telephone conversation between Sidney S. Zell and F. L. Armstrong, Packard's Administrative Assistant Field Sales Manager.

Plaintiff's Motion for a Directed Verdict on the Issue of Liability

[3105] 17. This stipulation shall not preclude any party from offering any documentary or other evidence as to any fact embodied in this stipulation.

Dated: March 29, 1955

William J. Hughes, Jr.
Attorney for Plaintiffs

Robert W. Barker
Attorney for Defendants

[3315] (Filed June 21, 1955)

Plaintiff's Motion for a Directed Verdict on the Issue of Liability

In accordance with *Rule 50 of the Federal Rules of Civil Procedure*, plaintiff at the close of all the evidence moves for a directed verdict in its favor on the issue of liability; and further moves the Court thereafter to submit to the jury only the question of plaintiff's damages.

The grounds for this motion are as follows:

1. No reasonable man could fail to find that there was an agreement or conspiracy between defendants to unduly restrain or monopolize interstate trade in Packard automobiles, parts, repairs, etc., in the Greater Baltimore area.

2. Packard's offer to renew Websters contract for a one year period even if made in good faith does not destroy Packard's liability.

3. Webster was under no legal duty to accept Packard's offer, whether or not made in good faith, and its refusal so to do in no way affects Packard's liability.

4. Substantial damages have been shown capable of assessment by the jury.

[3317] (Filed June 21, 1955)

Plaintiff's Requested Instructions

[1]

Webster's suit claims Packard (a) "conspired with Zell" and (b) "agreed with Zell" to make Zell the sole Packard dealer in the Baltimore area. Conspiracy is merely an agreement to do something the law forbids. "Conspired" merely means Packard at Zell's request intended to and did eliminate Webster as a dealer. "Agree" does not mean a formal contract but merely that Packard and Zell got together to achieve the same result, i.e. to make Zell the sole Baltimore Packard dealer. It is unnecessary for Webster to prove Packard specifically intended to restrain trade or create a monopoly; it is sufficient if that would be the result. It is likewise immaterial whether or not Packard acted at Zell's request or insistence or threats. Acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation of one.

[3318]

[2]

Packard's contention that it made Zell the sole authorized Packard dealer in Greater Baltimore for good business reasons or with good intentions is not a defense. Nor is it a defense if Packard thought such action would benefit

Zell or even the public. Webster's complaint is that Packard and Zell conspired and agreed to exclude Webster from the Baltimore market as a Packard dealer, thus giving Zell a Packard dealer monopoly. An attempt by agreement to exclude a competitor (Webster) is, in and of itself, illegal.

[3319]

[3]

The jury is instructed that where there are a number of Packard dealers in a metropolitan area the right to go from one to another to see which one will offer the best trade-in allowance is a valuable right the destruction of which constitutes an injury to the public. So too is the right to get estimates of various Packard dealers as to the cost of a repair job. In the present case the jury can assume injury to the public if it finds that Packard and Zell conspired or agreed to make and did make Zell the sole Packard dealer in the Baltimore area.

[3320]

[4]

The fact that Packard through Zell, or Zell by itself, competed for business with other makes of cars is immaterial. Webster's suit is based on the destruction of competition among Packard dealers.

[3321]

[5]

A conspiracy or agreement between Packard and Zell to give Zell a Packard dealer monopoly in Baltimore is illegal even though it might temporarily or even permanently benefit the public. As the Supreme Court has said

"Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein. . . ."

[3322]

[6]

The jury is instructed that, while interstate commerce must be involved in this type of case the Court finds as a matter of law that it is so involved and the jury need not consider this question.

[3323]

[7]

The jury need not find that Packard and Zell made an agreement to give an out-and-out monopoly to Zell. It is sufficient that such an agreement, if found, operated as an undue restraint on interstate commerce by eliminating competition.

[3324]

[8]

Packard claims that on April 18 or 22, 1952 it offered Webster a one year's renewal in good faith. It is a question for the jury to decide whether this offer was in fact made in good faith or on the contrary as part of a conspiracy with Zell to eliminate Webster as a competitor immediately or at the latest at the end of the renewal period, March 31, 1953. Webster contends Packard's offer was not in good faith and was merely the postponement of a death sentence already agreed upon by Packard and Zell.

As to whether Packard's offer was made in good faith the jury is entitled to consider Packard's refusal to give Webster's counsel assurances of good faith in response to Mr. Leahy's letter to Packard dated June 11, 1952.

Unless you find the offer was made in good faith you will not consider it in any way.

[3325]

[9]

Webster was entitled to have Packard consider its request for the 1952 renewal in good faith and without any interference on the part of Zell by threatening to quit if Packard gave Webster a renewal. If the jury finds Packard acted pursuant to Zell's threats it is entitled to find Packard acted in bad faith.

[3326]

[10]

Plaintiff Webster is not required to prove a bad intent or malice against the Webster Company on the part of Packard in making Zell the sole Baltimore dealer. It is sufficient that Packard intended to do the acts which resulted in giving Zell a monopoly of distribution of Packard cars and parts in the metropolitan Baltimore area.

[3327]

[10A]

While ordinarily a manufacturer may choose anyone as his dealer in a given market, he cannot do so by entering into an agreement or conspiracy to eliminate competitors.

[3328]

[11]

If you find for the plaintiff, you will then consider what damages resulted from defendants' acts. Plaintiff claims the following items of damage:

(a) Money lost in trying to minimize damages by continuing in the automobile business until December 30, 1953, when after terminating its Nash agency Webster finally closed its doors. Plaintiff claims the money so lost amounted to $24,912.97.

(b) Loss of future profits in the amount of $36,479.78 per year for however long a period you may find the Webster Company would have continued in business except for defendants' illegal acts.

You are instructed that these items are proper for you to consider, in the light of the evidence you have heard.

[3329]

[12]

In considering the number of years plaintiff would have continued in the automobile business except for defendants' alleged illegal acts you are entitled to consider the Webster Company's history of profitable operations and efficient management for the fifteen year period between 1937 and 1952. You are also entitled to consider testimony that the franchises of efficient dealers are ordinarily renewed from year to year for a substantial period of time. Webster claims it would have continued in business for a minimum period of 7¾ years, namely the unexpired portion of its lease, up to a period of fifteen years. You are the sole judges of what period if any Webster would have continued

in the automobile business but for defendants' alleged illegal acts.

[3330]

[13]

In considering what period if any Webster would have continued as a Packard dealer but for defendants' alleged illegal acts you are entitled to consider testimony that Packard officials assured Webster following the fire in 1949 that if it rebuilt and continued in the Packard business it could look forward to renewals of its Packard franchise for as many years in the future as it had in the past.

[3331]

[14]

In considering the total amount of future profits allegedly lost by Webster as a result of defendants' alleged illegal acts, you will multiply the amount, if any, you find Webster lost each year by the number of years, if any, you find Webster would have continued in the automobile business but for Packard's alleged illegal acts.

[3332] (Filed June 21, 1955)

Defendants' Requested Instructions

[1]

The jury are instructed as a matter of law that their verdict should be for defendants.

[3333]

[2]

The jury are instructed as a matter of law that there is no legally sufficient evidence in this case to warrant a verdict

for plaintiff and accordingly their verdict should be for defendants.

[3334]

[3]

Plaintiff must prove by a preponderance of the evidence that defendants participated in a contract, combination or conspiracy in unreasonable restraint of trade or commerce in violation of the anti-trust laws which injured plaintiff in its business or property.

[3335]

[4]

Plaintiff must prove by a preponderance of the evidence:

1. That defendants participated in a contract, combination or conspiracy, the purpose or inherent effect of which was to restrain trade or commerce;

2. That an act or acts done by defendants in pursuance of such contract, combination or conspiracy directly and proximately caused injury to the public;

3. That an act or acts done by defendants in pursuance of such contract, combination, or conspiracy directly and proximately caused a substantial interference with interstate commerce; and

4. That an act or acts done by defendants in pursuance of such contract, combination, or conspiracy directly and proximately caused injury to the business or property of plaintiff.

[3336]

[5]

If you find that plaintiff suffered a loss but also find that such loss resulted from its failure to accept a renewal of its Dealer's Sales Agreement, your verdict should be for defendants.

[3337]

[6]

The anti-trust laws do not forbid every restraint of trade or commerce. They forbid only such restraints as are unreasonable.

[3338]

[7]

If you find that what defendants did in connection with the dealership situation in Baltimore was done for the business purpose of protecting Packard's competitive position there, any resulting restraint of trade or commerce was not an unreasonable restraint and your verdict should be for defendants.

[3339]

[8]

Packard had a right to select the dealer or dealers in Baltimore to whom it would sell its products.

[3340]

[9]

Plaintiff had no right to require renewal of its Dealer's Sales Agreement in 1952.

[3341]

[10]

Plaintiff must prove by a preponderance of the evidence that injury to the public resulted from Zell's becoming the sole Packard dealer in Baltimore.

[3342]

[11]

If you find that, because of competition from dealers for other makes and from other Packard dealers, Zell could not charge higher prices or otherwise take advantage of the public by reason of the fact that he was the sole Packard dealer in Baltimore, your verdict should be for defendants.

[3343]

[12]

The test as to whether injury to the public resulted from Zell's becoming the sole Packard dealer in Baltimore is not merely whether injury resulted to the public by way of reduction in competition between Packard dealers but is whether, if any such injury did result, it was outweighed by any benefit to the public which you may find to have resulted from Zell's becoming the sole Packard dealer in Baltimore, such as increase in the vigor of competition between Packard and other makes in Baltimore.

[3344]

[13]

In considering whether injury to the public resulted from Zell's becoming the sole Packard dealer in Baltimore,

you should compare the situation which existed after Zell became the sole Packard dealer in Baltimore with the situation which otherwise would have existed. Your comparison must be from the point of view of the interest of the public in the prices for Packard products and the supply of Packard products and any other interest of the public in the distribution of Packard products. If, on the basis of your comparison, you do not find that such interest of the public was prejudiced by Zell's becoming the sole Packard Dealer in Baltimore, your verdict must be for defendants.

[3345]

[14]

In considering the question of public injury, you should consider whether Zell would have given up Packard if it had not become the sole Packard dealer in Baltimore, and, if so, what the resulting situation would have been.

[3346]

[15]

Plaintiff must prove by a preponderance of the evidence that substantial interference with interstate commerce resulted from Zell's becoming the sole Packard dealer in Baltimore.

[3347]

[16]

There is no substantial interference with trade or commerce unless there is a substantial reduction of the flow of products in trade or commerce.

[3348]

[17]

If you find that defendants participated in a contract, combination or conspiracy but do not find that the purpose or the inherent effect thereof was unreasonably to restrain trade or commerce, your verdict should be for defendants.

[3349]

[18]

Plaintiff must prove by a preponderance of the evidence that what defendants did in connection with the dealership situation in Baltimore was done for the purpose of putting Zell in a position to charge higher prices or otherwise injure the public, or that injury to the public was the inherent effect of what defendants did in connection with the dealership situation in Baltimore.

[3350]

[19]

Plaintiff must prove the amount of its actual damages with reasonable certainty and may not rely upon conjectural, speculative or subjective evidence.

[3351]

[20]

You may not award damages for loss of anticipated profits if it is speculative or conjectural whether plaintiff would have made any profits as a Packard dealer after the time when it ceased to be a Packard dealer.

[3352]

[21]

If you find that plaintiff failed to accept an offer of a renewal of its Dealer's Sales Agreement, you may not award damages for loss of anticipated profits for any period after the date of the offer or, if a time limit for acceptance was fixed, after the expiration of such time limit.

[3353]

[22]

You may not award damages for loss of anticipated profits for any period after February 13, 1953.

[3354]

[23]

You may not take the length of the unexpired term of the lease between plaintiff and Somerset Realty Company into consideration for the purpose of computation of damages for loss of anticipated profits.

[3355]

[24]

You may not take profits for the years 1946, 1947 and 1948 into consideration for the purpose of awarding damages for loss of anticipated profits.

[3356]

[25]

No part of the salary paid Richard C. Webster can be added to profit per books in the computation of damages for loss of anticipated profits.

[3357]

[26]

The estimated cost, amounting to $1,000, of personal services for Richard C. Webster in the form of transportation furnished cannot be added to profit per books in the computation of damages for loss of anticipated profits.

[3358]

[27]

The estimated cost, amounting to $600, for "other" personal services cannot be added to profit per books in the computation of damages for loss of anticipated profits.

[3359]

[28]

The estimated cost, amounting to $212.44, for personal services for Richard C. Webster in the form of Social Security and Insurance payments cannot be added to profit per books in the computation of damages for loss of anticipated profits.

[3360]

[29]

The $3,840.26 recovered in 1953 from George S. May Co. cannot be added to profit per books for 1951 in the computation of damages for loss of anticipated profits.

[3361]

[30]

You may not award damages for any loss incurred by plaintiff in its Nash dealership.

Statement of Counsel as to Services Rendered

[3362]

[31]

You may not award damages for the unrecovered cost of leasehold improvements at December 31, 1953.

[3363]

[32]

You may not award damages for loss on furniture and equipment.

[3364]

[33]

Under the anti-trust laws the Court is required to multiply by three any damages awarded by the jury. If you bring in a verdict for plaintiff, it must be only for single damages.

[3365]

[34]

You may not draw any inference against defendant Marshall G. Beck or any other defendant from the fact that Mr. Beck did not testify at the trial.

[3381] (Filed June 25, 1955)

Statement of Counsel as to Services Rendered

Pursuant to 15 U. S. C. 15, counsel for plaintiff submit the following Statement of Services Rendered.

Approximate Number of Hours devoted by William E. Leahy to preparation of case	500
Approximate Number of Days devoted by William E. Leahy to taking of depositions	9

Statement of Counsel as to Services Rendered

Time spent by William E. Leahy in trial of case (including argument of motions, pretrial and interlocutory matters)	24 days
Approximate Number of Hours devoted by William J. Hughes, Jr. to preparation of case	346
Approximate Number of Days devoted by William J. Hughes, Jr. to taking of depositions	11
Time spent by William J. Hughes, Jr. in trial of case (including argument of motions, pretrial and interlocutory matters)	22 days
Time spent by Associate Counsel (Donald D. Webster, James F. Reilly, Ben Ivan Melnicoff) in preparation of case, writing of briefs, motions, memoranda, etc.—approximate	1900 hours

In view of the amount of the judgment herein and the amount of time devoted to the case, the undersigned counsel of record feels that the sum of $125,000.00 would be a reasonable fee for all counsel for plaintiff for services rendered herein.

Respectfully submitted,

WILLIAM E. LEAHY

[3382] POINTS AND AUTHORITIES

15 U. S. C. 15 provides that in addition to recovering treble damages, one in plaintiff's position is entitled to recover "the cost of the suit, including a reasonable attorney's fee." The question thus arises as to the interpretation to be given these words and the amount to be awarded.

Statement of Counsel as to Services Rendered

By way of general considerations, we respectfully submit that cognizance should be taken of the fact that antitrust actions are traditionally long, drawn-out and difficult to present and maintain against top-flight defense counsel. Accordingly it is most unlikely that such suits as plaintiff's would ever be brought unless payment for the benefit of plaintiff of the fair charges of competent counsel is assured in the event of success. This is doubly so where, as in the case at bar, plaintiff had no previous government action upon which to lean.

It is well recognized that the underlying purpose of the treble-damage section is to enlist private parties to assist the government to enforce the antitrust laws. In view of this, it is essential that prospective plaintiffs know that if they succeed in their hazardous and expensive task, they will be awarded attorney's fees in such amount as to encourage them to retain counsel somewhat equivalent in calibre and strength to the teams of specialists who almost invariably represent defendants. Otherwise plaintiffs would be inclined to employ counsel whose services could be most inexpensively retained regardless of the importance of the case.

It is worth noting that in the instant suit defendants Packard, Beck and Porter were represented of record by three [3383] distinguished firms, Brandenburg & Brandenburg; Wilkinson, Boyden, Cragun & Barker; and Hughes, Hubbard, Blair and Reed. Throughout the trial at least four experienced attorneys were continually at defendant's counsel table. During the trial Packard's key witnesses admitted that ever since February 20, 1952 Packard had not taken a step in connection with the Webster matter without first clearing it with yet another legal firm representing Packard as General Counsel. Presumably after Packard's merger with Studebaker in 1954 the Studebaker-Packard legal staff have been busily engaged in preparing the defense of this suit.

Statement of Counsel as to Services Rendered

It is the belief of plaintiff that the words "reasonable attorney's fee" should be construed as meaning the amount which counsel, under all the circumstances of the particular case, could reasonably charge the plaintiff according to commonly accepted standards of the profession for measuring charges between attorney and client.

While the criteria for determining attorney's fees are of course well known to the court, the following enumeration is made as a basis evaluation of them against the history of the present case, viz:

1. The nature of the undertaking (its novelty, its ease or difficulty of performance, its significance, the risk of success) and the character of the services required.

2. The responsibility assumed.

3. The professional repute, standing, ability and experience of counsel.

4. The services rendered, including the time and labor required.

5. The magnitude and importance of the case.

[3384] 6. The opposition encountered.

7. The size of the recovery.

8. The professional competence displayed, including skill, industry and diligence.

9. The fidelity of counsel to the interests of their client.

10. Customary charges and going rates for comparable attorneys for similar services, considering the loss of income and opportunities for other employment due to employment in this litigation.

Lengthy comments on these criteria is not called for, but we do want to emphasize one or two points.

A. A very large amount of work was required because of the unyielding nature of the defense. The Court will recall defendants' position that not a single one of plaintiff's interrogatories was proper, and the time spent in obtaining answers and further answers. So also defense counsel's conduct as to the production of documents under Rule 34, and the protraction of preparation for trial and actual trial because of defense counsel's unreadiness to stipulate facts obviously not in dispute. It seems but fair that the cost of such unnecessary activities should be fully borne by defendant.

B. The volume of detail required the assistance of junior associate counsel; and hence inclusion of reasonable compensation for their services represents a saving in what would have been the cost had senior counsel done the necessary spade work.

C. The questions of law as to the measure of damages, and the preparation of charts, calculations and tabulations on various possibilities and their honest integration with plaintiff's [3385] books required lengthy discussions with, and the expenditure of much time by, certified public accountants, and their testimony and their continued presence in Court as commentators on defense evidence and possible use as rebuttal witnesses. Their reasonable charges were a proper and unavoidable expense of plaintiff's counsel in discharging their function.

D. The cost of making large numbers of photostats is a proper expenditure of plaintiff's counsel, since the photostats expedited the presentation of the case.

Statement of Counsel as to Services Rendered

E. The printing of plaintiff's main brief was warranted by the assistance which it gave to the Court and all parties.

CASES

A $100,000 attorney's fee was awarded in *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, C. A. Mo. 1952, 194 F2d 846, cert. denied 72 S. Ct. 1035. In sharp contrast with Webster's burden, there the Court pointed out that that case involved no novel questions, and the decree and record in a government suit against the same defendants made out a prima facie case.

The cases are collected in Judge Wyzanski's opinion in *Cape Cod Food Products, Inc.* v. *National Cranberry Association*, 119 F. Supp. 242.

See also 10 Cyc. of Federal Procedure, 3rd Ed., Section 38.46 and cases cited.

William E. Leahy
Wm. J. Hughes, Jr.
Counsel for Plaintiff

[3386]

CIVIL DOCKET

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

WEBSTER MOTOR CAR CO., *vs.* PACKARD MOTOR CAR CO.,
C. A. No. 674-53 Preceding Page No.

	PARTIES	ATTORNEY
1	THE WEBSTER MOTOR CAR COMPANY	William E. Leahy William J. Hughes, Jr., 1000 Bowen Bldg

Statement of Counsel as to Services Rendered

2. RICHARD C. WEBSTER	
v	Brandenburg & Brandenburg
1. PACKARD MOTOR CAR COMPANY	Wilkinson, Boyden, Cragun & Barker 744 Jackson Pl., N.W.
2. ZELL MOTOR CAR COMPANY	Herbert J. Miller, Jr. 800 World Center Bldg.
3. MARSHALL BECK	Wilkinson, Boyden, Cragun & Barker 744 Jackson Pl., N.W.
4. C. M. PORTER	do
5. SAMUEL HOWELL	do
6. CLARE BRIGGS	
7. ROY ABERNETHY	
8. F. L. ARMSTRONG	
9. L. E. FERN, Individually and as agents of defendant PACKARD MOTOR CAR COMPANY	
10. SIDNEY ZELL	Herbert J. Miller, Jr. 800 World Center Bldg.
11. O. ENGLAR GILBERT	

[3387]

12. J. JACKSON SMITH	
13. G. DALE PROCTOR	
14. JOSEPH JANIN, Individually and as agents of the ZELL MOTOR CAR COMPANY	

Statement of Counsel as to Services Rendered

[3388]

(See Preceding Page for Complete Caption)

ACTION FOR TREBLE DAMAGES UNDER ANTI-TRUST LAWS

Jury demand X

Date	Account	Rec'd	Disb'd
1953			
Feb. 13	Hughes	10 00	
Mar. 31	U. S. Treas.		10 00

[3389]

Date	Proceedings	
1953	Deposit for cost by	
Feb. 13	Complaint, appearance & Jury Demand All ser. 2-16-53.	filed
Feb. 13	Summons, copies (4) and copies (4) of Complaint issued to, #1, #3, #4, #5,	
Mar. 5	Appearance Hughes, Hubbard, Blair & Reed (New York), attys. for 1, 3, 4 & 5.	filed
Mar. 5	Appearance of Wilkinson, Boyden, Cragun & Barker, attys. for defts. 1, 3, 4, & 5.	filed
Mar. 5	Notice of defts. 1, 3, 4 & 5 to take depositions of R. C. Webster, Harry French and Donald Webster; c/m 3-5-53.	filed
Mar. 6	Stipulation order enlarging time for defts. to answer complaint to and including April 1, 1953.	filed
Mar. 6	Consent order enlarging time for defts., Zell Motor Car Co. & Sidney Zell, to answer or file any other pleadings, motions or objections, to & including 4-1-53; Letts, J. (N)	

Statement of Counsel as to Services Rendered

Date	Proceedings	
Mar. 6	Special appearance of Herbert J. Miller, Jr. as atty. for defts. #2 & #10.	filed
Mar. 9	Answer of defts. 1, 3, 4 & 5 to complt; c/m 3-9-53.	filed
Mar. 11	Stipulation for extension of time for taking deposition; c/service 3-11-53.	filed
Apr. 1	Motion of deft. #2 to dismiss action or, in the alternative, to quash summons & the service & the return of service of summons; P & A; exhibit "A"; c/s 4-1-53; M. C. 4-1-53.	filed
Apr. 1	Motion of deft. #10 to dismiss action or, in the alternative, to quash summons & the service & the return of service of summons; P & A; exhibit "A"; c/s 4-1-53; M. C. 4-1-53.	filed
Apr. 16	Consent order quashing service of process & return on defts., Zell Motor Car Co., & Sydney Zell & dismissing complt as to Zell Motor Car Co. & Sydney Zell, without prejudice. Morris, J.	(N)
May 14	Deposition of George L. Graf; published &	filed
June 15	Order dismissing cause, without prejudice, as to defts. Clare Briggs, Roy Abernethy, F. L. Armstrong, L. E. Fenn, O. Englar Gilbert, J. Jackson Smith, G. Dale Proctor & Joseph Janin. Morris, J.	(N)
June 15	Calendared	(N)
July 21	Stipulation of counsel re inspection of documents, etc.	filed
1954		
Feb. 16	Deposition of Marshall G. Beck Aug.-10th & 11th, ($230.25 paid by pltfs.)	filed

Statement of Counsel as to Services Rendered

Date	Proceedings
[3390]	
1954	
Mar. 3	Deposition of Franklin DeBaugh, Jr. & John Wesley Ward by pltfs. published & filed
Apr. 16	Notice of defts. of taking deposition of deft. #10; c/m 4-12-54. filed
Apr. 23	Pltf's interrogatories to deft #1; Exs. (3) filed
Apr. 23	Motion of pltf for production of documents under Rule 34; c/s 4-23-54; P & A filed
May 3	Stipulation extending time for deft. to file P & A in opposition to pltf's motion for production of documents, to serve objections to pltf's interrogatories, & answer pltf's interrogatories, & to answer pltf's interrogatories to 6-4-54; & should deft. file objection to said interrogatories the time required to answer will be extended until 20 days after such objection. (Fiat) McGuire, J. (N)
June 2	Deposition of Samuel D. Braden, 1-12-54, ($82.50 pd. by pltf). filed
June 4	Objections of deft #1 to interrogatories & notice; P & A; c/s 6-4-54; exhibits #1, 1A, & 2. M. C. 6-4-54. filed
June 4	P & A of deft #1 in opposition to motion for production of documents; c/s 6-4-54; affidavit; M. C. 6-4-54. filed
June 16	Stipulation of pltf & deft #1 for extension of time for pltf to answer deft's objections to interrogatories to & incl. 7-10-54 filed

Statement of Counsel as to Services Rendered

Date	Proceedings	
June 18	Deposition of Stanley Zell, vol. #1, 4-26-54; vol. II, 4-27-54; published and	filed
July 20	P & A of pltf. in opposition to objections to interrogatories; c/m 7-19-54.	filed
Oct. 11	Supplemental P & A of deft in support of objections to interrogatories; ser. ack. 10-9-54.	filed
Oct. 26	Motion of deft. #1 for leave to withdraw copies of depositions of Samuel D. Braden & Sidney S. Zell (consent; P & A; c/ser. 10-26-54.	filed
Oct. 27	Order granting deft. #1 leave to withdraw copies of depositions of Samuel D. Braden & Sidney S. Zell. Holtzoff, J. (N)	
Nov. 3	Deft's exhibits 1 thru 55 on depositions of pltfs.	filed
Nov. 3	Deft's exhibits 56 thru 67 on deposition of George L. Graf.	filed
Nov. 3	Deft's exhibits 1 thru 20 and pltf's exhibits 1 thru 2 E on deposition of Sydney Zell.	filed

[3391]

1954

Nov. 3	Pltf's exhibit #1 & deft's exhibits 1 thru 4-B on deposition of Samuel Braden.	filed
Nov. 3	Pltf's exhibits 1 thru 30 on deposition of Marshall Beck.	filed
Nov. 3	Receipt from attys of deft Packard Motor Co. for copy of deposition of Samuel D. Braden & copy of deposition of Sidney S. Zell withdrawn per order 10-27-54.	filed

Statement of Counsel as to Services Rendered

Date	Proceedings	
Nov. 22	Consent order authorizing Clerk to withdraw & deliver to counsel for deft. deft's exhibit 10B on deposition of Sidney S. Zell; deft. to file in lieu thereof a conformed copy of said exhibit.	filed
Nov. 26	Memo of deft. #1 in opposition to pltf's form of order & in support of deft's counter form of order.	filed
Dec. 3	Memorandum sustaining in part & overruling in part objections to interrogatories. Holtzoff, J. (N)	
Dec. 4	Order granting pltf's motion to produce documents & deft. allowed 30 days from date hereof within which to produce. Holtzoff, J. (N)	
Dec. 10	Order extending time for Packard Motor Car Co. to answer the interrogatories for 30 days from date of this order. Holtzoff, J. (N)	
Dec. 20	Pltf's commentary on problems of order to be entered as to interrogatories & proposed orders submitted; c/m 11-30-54.	filed
Dec. 21	Deft's exhibit 10B withdrawn and returned to atty per order 11-22-54.	
Dec. 31	Depositions (4) of Richard C. Webster, Harry French & Donald Webster on April 7, 8, 9, & 10, 1953 in behalf of deft's corrections.	filed
1955		
Jan. 10	Ans. of deft. to interrogatories; ser. aek. 1-10-55.	filed

Statement of Counsel as to Services Rendered

Date	Proceedings	
Jan. 21	Notice & memo of pltfs that at pre-trial pltfs will ask further answers to interrogatories and additional production of documents; c/m 1-19-55.	filed
Jan. 27	Motion of deft #1 for production of documents under Rule 34, ser. ack: 1-27-55; affidavit. M. C. 2-17-55.	
Feb. 7	Interrogatories of deft #1 addressed to pltf & exhibits.	filed
Feb. 8	App. Brandenburg & Brandenburg for deft #1	filed
Feb. 17	Motion of defts 1, 3, 4, 5 for leave to amend; notice; c/m 2-16-55; affidavit; M. C. 2-17-55.	filed
[3392]		
1955		
Feb. 25	Opposition of deft #1 to pltf's request for further answers to interrogatories; c/m 2-25-55.	filed
Feb. 25	Opposition of deft #1 to pltf's request for additional production of documents.	filed
Feb. 28	Supplemental answers of deft Packard Motor Car Co. to interrogatories; c/s 2-26-55.	filed
Mar. 3	Memorandum requiring further answers to certain interrogatories. Holtzoff, J.	(N)
Mar. 3	Memorandum requiring answers to certain interrogatories & not requiring answers to other interrogatories. Holtzoff, J.	(N)
Mar. 9	Stipulation of counsel for pltfs & deft. re: initialling of documents.	filed

Statement of Counsel as to Services Rendered

Date	Proceedings	
Mar. 14	Memo of deft #1 in opposition to pltf's request for additional production of documents; c/s 3-14-55. —M. C. 3-16-55	filed
Mar. 14	Motion of deft #1 for reargument of pltf's motion for rehearing further answers to interrogatories; affidavit; c/s 3-14-55.	filed
Mar. 14	Motion of deft #1 for reargument pltf's motion for production of documents; affi; exhibit "A"; c/s 3-14-55. M. C. 3-16-55.	filed
Mar. 16	Motion of deft for order compelling answers and further answers to interrogatories; P&A; c/s 3-15-55; M. C. 3-16-55.	filed
Mar. 18	Transcript of proceedings, 3-2-55, pp. 1-59.	filed
Mar. 18	Proposed stipulation of facts; c/s 3-17-55; & copy of notice.	filed
Mar. 18	Amended answers of deft. #1 to interrogatories; c.s 3-18-55.	filed
Mar. 22	Pltf's answers to interrogatories.	filed
Mar. 22	Memorandum granting deft's motion to require further answers to interrogatories nos. 59, 61, 62, 64, 66, 80, 81, 82, 86(e) & 103; & denying motion otherwise.	Holtzoff, J. (N)
Mar. 23	Pltf's memorandum in opposition to deft's motion for order compelling further answers to deft's interrogatories; c/m 3-18-55.	filed
Mar. 30	Pre-trial proceedings.	Holtzoff, J.

Statement of Counsel as to Services Rendered

Date	Proceedings	
Mar. 31	Transcript of proceedings (PP. 1-74), Mar. 21, 1955.	filed
Apr. 1	Order granting deft's motion for leave to amend answer. Holtzoff, J. (N)	
Apr. 6 — —	Order compelling answers & further answers to interrogatories. Holtzoff, J. (N)	
Apr. 8	Opinion in re interrogatories. (11-4-54) Holtzoff, J.	
[3393]		
1955		
Apr. 12	Answers of pltf to interrogatories.	filed
Apr. 15	Certified record of official court reporter, March 30, 1955 pp. -1-32 Thomas H. Doran, Jr.	filed
Apr. 25	Amended answers of deft (Studebaker-Packard) to interrogatories; c/m 4-25	filed
Apr. 30	Defts Memorandum of Law,	filed
May 7	Motion of Pltf. to withdraw deposition (fiat) Curran, J.	
May 9	Return of Deposition of Marshall Beck filed 2-16-54, to District Ct. files by Wm. E. Hughes, Jr.	
May 11	Notice by Defts. of intention to move for amendment of answer; c/s 5-10-55; Exhibit.	filed
May 11	Notice by Defts. of objections to items of damage in Summary of Losses and Damages claimed; c/m 5-9-55	filed
May 12	P & A's in support of Defts. motion for leave to amend answer; c/s 4-12-55	filed

Statement of Counsel as to Services Rendered

Date	Proceedings	
May 13	Answer of Pltf. to Deft's notice of objections to Pltf's items of damages; c/s 5-14-55	filed
May 17	Affidavit of Robert W. Barker in answer to pltf's answer to notice of objections to pltf's items of damages; c/m 5-16-55.	filed
May 26	Jurors from criminal divisions 4 & 6 sworn on voir dire; jury & 2 alternate jurors sworn; respited until tomorrow morning; reported by E. Sweeny & Chloe MacReynolds.	Holtzoff, J.
May 27	Trial resumed; same jury; respited until Tuesday morning; (Reporter—Sweeney and McReynolds)	Holtzoff, J.
May 31	Interrogatories of deft. Studebaker-Packard to pltfs. (as of 2-7-55)	filed
May 31	Plaintiff's outline of case for pre-trial; c/s 2-17-66 (as of 2-17-55).	filed
May 31	Deft's pre-trial memorandum; c/s 2-26-55; (as of 2-28-55)	filed
May 31	Stipulation. (as of 3-29-55.)	filed
May 31	Stipulation of facts. (as of 3-29-55)	filed
May 31	Pltfs' reply brief; c/s 5-9-55. (as of 5-9-55)	filed
Jun 1	Trial resumed; same jury; ~~by agreement~~ case respited until tomorrow morning (Reporter—Sweeney and McReynolds.	Holtzoff, J.
June 2	Trial resumed; same jury; respited until tomorrow morning; reported by E. Sweeney & C. MacReyonlds.	Holtzoff, J.
June 3	Trial resumed; same jury; case respited until 10:30 A. M. Monday morning; (Reporter—Sweeney and McReynolds)	Holtzoff, J.

Statement of Counsel as to Services Rendered

[3394]

Date	Proceedings	
1955		
June 6	Trial resumed; same jury; case respited until tomorrow morning; reported by Sweeney & MacReynolds.	Holtzoff, J.
June 7	Trial resumed; same jury; respited until tomorrow morning; reported by Sweeney & MacReynolds.	Holtzoff, J.
June 8	Trial resumed; same jury; respited until 6-9-55; reported by Sweeney & MacReynolds.	Holtzoff, J.
June 9	Trial resumed; same jury; case respited until 6-10-55; reported by Sweeney & MacReynolds.	Holtzoff, J.
June 10	Trial resumed; same jury; respited until 6-14-55; reported by Sweeney & MacReynolds.	Holtzoff, J.
June 13	Affidavit of Norman F. Graser.	filed
June 14	Trial resumed; same jury; respited until tomorrow morning; reported by E. Sweeney & C. MacReynolds.	Holtzoff, J.
June 14	Pltf's memorandum as to alleged defense of release of joint tort feasor.	filed
June 14	Motion to vacate or modify stay order of 4-29-55 & appendix #2.	filed
June 15	Trial resumed; same jury; respited until tomorrow morning; reported by Evelyn Sweeney & Chloe MacReynolds.	Holtzoff, J.
June 16	Trial resumed; same jury; respited until 11:30 a.m. tomorrow; reported by E. Sweeney & C. MacReynolds.	Holtzoff, J.

Statement of Counsel as to Services Rendered

Date	Proceedings
June 17	Trial resumed; same jury; respited until 6-20-55; reported by E. Sweeney & Chloe MacReynolds. Holtzoff, J.
June 20	Trial resumed; same jury; 2 alternates discharged; jury excused at 5:40 p.m.; to return to Court at 10:00 a.m. tomorrow to resume deliberation; reported by E. Sweeney & C. MacReynolds. Holtzoff, J.
June 21	Jury returns into Court at 10:00 a.m. to resume their deliberation; verdict for pltf., Webster Motor Car Co., against defts., Packard Motor Car Co., Marshall Beck & C. M. Porter, in the sum of $190,000.00, & the Court having directed, pursuant to to 15, U. S. Code 15, that pltf. recover threefold the damages it sustained; verdict by direction of the Court in favor of deft. Samuel Howell, against pltf., Webster Motor Car Co., & in favor of all defts. against pltf., Richard C. Webster; reported by Evelyn Sweeney & Chloe MacReynolds. Holtzoff, J.

[3395]

—over—

1955

June 21	Verdict & judgment for pltf., The Webster Motor Car Co. vs. defts. Packard Motor Car Co., Marshall Beck & C. M. Porter for $570,000.00 & costs. Holtzoff, J. (N)
June 21	Verdict & judgment for deft. Samuel Howell vs. pltf., The Webster Motor Car Co. Holtzoff, J. (N)
June 21	Verdict & judgment for defts., Packard Motor Car Co., Marshall Beck & C. M. Porter vs. pltf. Richard C. Webster. Holtzoff, J. (N)

[3398] (Filed June 28, 1955)

Opposition to Application for Attorneys' Fee

Defendant Studebaker-Packard Corporation (formerly Packard Motor Car Company), Marshall Beck and C. M. Porter, hereinafter referred to as "Defendants", by their attorneys, oppose the application of plaintiff's attorneys for allowance of attorneys' fees.

I. Defendants oppose the application for the following reasons:

A. The application is premature because:

1. Defendants' time to make a motion for judgment under Rule 50(b) of the Federal Rules of Civil Procedure and a motion for a new trial under Rule 59 of such rules will not expire until July 1, 1955, and defendants will make each of such motions on or before such date;

2. It should not be necessary for the Court or defendants to devote the time and attention to an application for allowance of attorneys' fee unless and until the Court denies both of such motions.

B. The application does not comply with the requirements of Rule 16 of the local civil rules because it is not made on written motion and is not supported by a statement detailing with particularity the nature and extent of services rendered, the time devoted thereto and the amount claimed therefor as required by such rule.

C. The application does not comply with the require- [3399] ments of Rule 7(b) of the Federal Rules of Civil Procedure relating to motions because it is

not made by a motion in writing, does not state with particularity the grounds therefor and does not set forth the relief or order sought.

D. The application does not constitute an appropriate showing for allowance of attorneys' fee under Section 7 of the Sherman Act.

E. The application is not supported by any sworn statement.

F. The amount claimed in the application is not justified by any appropriate standard and is grossly excessive.

G. The application sets forth an estimate of time claimed to have been devoted to preparation, briefs, motions, memoranda, etc., without reference to any record or other basis for the estimate.

H. The application fails to specify what plaintiff's attorneys deem to be an appropriate per diem or per hour charge for the time of the various lawyers referred to in the application.

I. The application claims attorneys' fees on the basis of work done by Donald D. Webster who is the Vice-President and a director of plaintiff and son of the owner of substantially all of the stock of plaintiff. Such work is not a proper basis for allowance of attorneys' fee herein.

J. The application does not indicate how much of the work for which an allowance of attorneys' fee is

claimed, or how much of the time claimed to have been spent by "Associate Counsel", was work done or time spent by Donald D. Webster.

K. The application claims attorneys' fees on the basis of charges of accountants. Such charges are not a proper basis for allowance of attorneys' fee herein.

L. The application does not indicate how much of the amount claimed in the application is for charges of accountants.

[3400] M. The application does not disclose the amount of the charges of accountants.

N. The application provides no basis for determination as to the reasonableness for the charges of accountants.

O. The application does not specify the amounts claimed for disbursements or the nature of the disbursements.

P. The allegations in Paragraph A on Page 3 of the Points and Authorities filed with the application to the effect that a very large amount of work on the part of plaintiff's attorneys in connection with the interrogatories and production of documents was caused unnecessarily by defendants are not true. On the contrary, a very large amount of such work was caused unnecessarily by plaintiff's attorneys themselves.

Q. The allegations of Paragraph A on Page 3 of the Points and Authorities filed with the application to

the effect that protraction of preparation for trial and the trial resulted from unreadiness on the part of defendants' counsel to stipulate facts obviously not in dispute are not true. On the contrary, defense counsel stipulated all facts the stipulation of which was appropriate.

II. The application was served upon defense counsel on Saturday, June 25, 1955. Defense counsel received no notice of a hearing thereon until Monday, June 27, 1955. Defense counsel have not had ample time to prepare for the hearing. Defendant's interest can be adequately protected on the application only if there is a full hearing thereon and adequate time for defense counsel to prepare therefore, adequate opportunity for defendants' counsel to examine all records and documents in the possession of plaintiff's attorneys or plaintiff pertinent to the application, adequate opportunity for defense counsel to examine under oath the attorneys on whose work the application is based, and adequate opportunity for defense counsel, if they are so advised, to adduce expert testimony on the reasonableness of the amount claimed.

[3401] III. For the reasons stated above, defendants object to the holding of a hearing on the application earlier than two weeks after the Court's determination of the defendant's motion for a judgment under Rule 50(b) and defendant's motion for a new trial.

IV. Defendants respectfully request that a hearing on the application be held not earlier than two weeks after the Court's determination of defendant's motion for a judgment under Rule 50(b) and defendant's motion for a new trial, and that such hearings be held before the Court or

before the Auditor of the Court or before a special master appointed by the Court.

Respectfully submitted,

HUGHES, HUBBARD, BLAIR & REED
One Wall Street
New York 5, New York
By: HAROLD L. SMITH

WILKINSON, BOYDEN, CRAGUN & BARKER
744 Jackson Place, N. W.
Washington 6, D. C.
By: ROBERT W. BARKER

Attorneys for Defendants

LOUIS M. DENIT
Of Counsel.

[3402] (Filed June 30, 1955).

Affidavit in Support of Application for Attorneys' Fee

CITY OF WASHINGTON
DISTRICT OF COLUMBIA, SS:

WILLIAM E. LEAHY being first duly sworn deposes and says that he, as one of counsel in the above-entitled cause, submitted a statement of the approximate number of hours devoted by him to preparation of the case, to taking depositions therein, and in argument of motions, pre-trial and interlocutory matters, as well as in the trial thereof; that he submits this affidavit in support of that statement and avers that said approximation of hours, dates, etc. given in said statement is true to the best of his knowledge and recollection; that he has never kept a complete diary of work done in any case in over forty years of his practice; that he has never considered that the work of an attorney or lawyer in his profession could be measured by the rules of the market

place; he believes it to be impossible for any counsel, conscientiously devoted to preparation and trial of a cause for his client, accurately to record the hours engaged in study, thought and mental work connected with said preparation and trial; he has no work sheets because he never considered his fee should be measured by hourly schedules kept or the time spent in formal study or conference. While helpful, such are not determinative either of the work done or the fee earned.

[3403] Affiant further says that this particular statement given was made to inform the Court generally of what counsel for the defendants must already know since the depositions were taken, arguments made, pretrial and trial work performed under their notice; further since the complaint was filed, they knew that the court in its discretion had the statutory right to award counsel fees to counsel for plaintiff, if successful. Therefore, affiant concluded as of course that defendants' counsel could not be heard to assert surprise, or lack of time for preparation to answer their application, since both the quantum and quality of service rendered by all counsel in the prosecution and the defense of the complaint were known by all parties presently interested and interested from the beginning and all had approximately knowledge of what was being done, when it was done, and what was required in order that it be done in time spent and work load carried.

WILLIAM E. LEAHY

Subscribed and sworn to before me this 30th day of June, 1955.

/S/ Emily V. McKenzie
Notary Public, D. C.
My commission expires 4/1/60

[3314] (Filed June 21, 1955)

Verdict and Judgment

This cause having come on for hearing on the 26th day of May, 1955, before the Court and a jury of good and lawful persons of this district, to wit:

Yvetta M. Binette	Elvira A. Kannenberg
Audrey M. Carey	Mildred O. Kelly
Mildred Cuddy	Ola D. Lee
Eugene A. Ford	Julia B. Richardson
Dolores D. Hagans	Mary L. Ryals
Louise C. Hager	Bertie B. Tipton

who, after having been duly sworn to well and truly try the issues between The Webster Motor Car Co., plaintiff and Packard Motor Car Co., Marshall Beck and C. M. Porter, defendants, and after this cause is heard and given to the jury in charge, they upon their oath say this 21st day of June, 1955, that they find the issues aforesaid in favor of the plaintiff The Webster Motor Car Co., and that the damages sustained by said plaintiff by reason of the premises is the sum of One Hundred Ninety Thousand ($190,000.00) Dollars.

WHEREFORE, pursuant to Title 15 Section 15 of the U. S. Code, it is adjudged that said plaintiff The Webster Motor Car Co. recover of the said defendants Packard Motor Car Co., Marshall Beck and C. M. Porter the sum of Five Hundred Seventy Thousand ($570,000.00) Dollars together with costs.

HARRY M. HULL, Clerk

By direction: By DANIEL J. MENCOBONI

ALEXANDER HOLTZOFF Deputy Clerk

JUDGE

[3562] (Filed Nov. 22, 1955)

Order Allowing Attorneys' Fee

This cause coming on to be heard upon plaintiff Webster Motor Car Company's application for attorneys' fees under the provisions of 15 U. S. C. Section 15 and opposition thereto having been filed and the parties having been heard, it is this 22 day of November, 1955,

ORDERED, that attorneys' fees to and including June 30, 1955 in the sum of $45,000.00 be and the same are hereby allowed to plaintiff Webster Motor Car Company under the provisions of 15 U. S. C. Section 15.

ALEXANDER HOLTZOFF
Judge

No Objection as to Form:
ROBERT W. BARKER
Attorney for Defendants

[3411] (Filed July 1, 1955)

Motion for Judgment Notwithstanding the Verdict Under Rule 50(b)

Come now defendants Studebaker-Packard Corporation (formerly Packard Motor Car Company), Marshall Beck and C. M. Porter, by their attorneys, and move the Court for an order setting aside the verdict herein and the judgment heretofore entered thereon and for judgment under Rule 50(b) in favor of these defendants notwithstanding said verdict in accordance with their previous motion for a directed verdict on the following grounds:

1. No reasonable jury could find the defendants are liable herein.

2. Defendants have been released from any and all liability on each and every claim sought to be asserted in

the complaint as alleged in the Sixth Defense in their answer herein.

3. There was no sufficient evidence on which the jury could find that plaintiff had established any of the essential elements of a cause of action under the anti-trust laws.

4. There was no sufficient evidence on which the jury could find that the alleged acts of defendants complained of were the proximate cause of the loss of plaintiff's dealership.

5. There was no sufficient evidence on which the jury could find that the termination of plaintiff's dealership resulted in injury to the public in the form of increase in prices for or diminution of the supply of Packard products, or in any other form.

[3412] 6. There was no sufficient evidence on which the jury could find that defendants participated in a contract, combination or conspiracy having the purpose or inherent effect of restraining trade.

7. There was no sufficient evidence on which the jury could find that the termination of plaintiff's dealership resulted in a substantial interference with interstate commerce.

8. The evidence showed that if there was any restraint of trade or commerce, it was not an unreasonable restraint and no reasonable jury could find otherwise.

Motion for Judgment Notwithstanding the Verdict Under Rule 50(b)

9. There is no theory of law which supports plaintiff's claim for damages.

10. There was no evidence of legally recoverable damages the evidence being entirely speculative, vague and conjectural, and not of a character which in law would support a verdict for plaintiff.

11. There was no evidence justifying submission of this case to the jury.

12. At the close of plaintiff's case, there was no evidence legally sufficient to warrant a verdict in plaintiff's favor and the Court should have directed a verdict for defendants.

HUGHES, HUBBARD, BLAIR & REED
One Wall Street
New York 5, New York

By: HAROLD L. SMITH

WILKINSON, BOYDEN, CRAGUN & BARKER
744 Jackson Place, N. W.
Washington 6, D. C.

By: ROBERT W. BARKER
Attorneys for Defendants.

LOUIS M. DENIT
Of Counsel.

[3404] (Filed July 1, 1955)

Motion for New Trial

Come now defendants Studebaker-Packard Corporation (formerly Packard Motor Car Company), Marshall Beck and C. M. Porter, by their attorneys, and move the Court, under Rule 59, to vacate and set aside the verdict of the jury and the judgment heretofore entered thereon and to grant a new trial upon the following grounds:

1. The verdict is against the evidence, is not supported by the evidence and is contrary to the evidence.

2. The verdict is against the weight of the evidence.

3. The verdict is contrary to law.

4. The verdict is excessive.

5. The verdict is excessive and appears to have been given under the influence of passion and prejudice induced by the following statements of plaintiff's counsel on summation:

APPEALS TO PASSION

"I said that the conduct was stupid. It was ruthless." (1800)

"Now, I suppose DeBaugh [Mr. DeBaugh was not a party to this action] has no feeling. I suppose he has no sense of responsibility for taking care of his son who was in the business there, too, with him. He was just too small. We don't care about that. Let's get rid of him." (1800)

"It was at that point when he was asked, Well, what did you do with DeBaugh—poor little DeBaugh. Yes, he is a small business man, but he had done the best he could. * * *" (1809)

[3405] "What did this corporation do? Cut his head off. * * *" (1810)

"These people had been engaged together in business, DeBaugh and Packard. I don't care how small he is. We have a right to protect the small businessman just as we protect the big. We have an obligation of citizenship to see to it that a fair deal is given to the DeBaughs in their life as well as to the Zells." (1813)

"* * * What do we care about these people whom we strike down and destroy? Why should we, the great Packard industry, have any thought of sympathy or cooperation for these people who have been with us all of their business life? No. Cut their heads off. Then we will complain if the son tries to stop the flow of blood." (1815)

"* * * And they left without telling us there ever had been a New York Conference; that there ever had been a decision made to make it a one-man town; that they had ever cut DeBaugh's head off in order to implement the program; * * *" (1828)

APPEALS TO PREJUDICE

"* * * Packard is a big company. It spreads over the United States like a net." (1788)

"* * * this great national network of business which this company does * * *" (1809)

"* * * this one of the big independent companies * * *" (1811)

"* * * the great Packard industry * * *" (1815)

"* * * these great national companies * * *" (1827)

"* * * this great manufacturer * * *" (1915)

"* * * What kind of a son would you think he was, if lawyer that he is, he did not under these circumstances try to prevent his father, engaged [3406] in a reasonably small business, yes, from the outrageous destruction which was being wrought upon him by a pet competitor, one who threw parties at which Mr. Briggs, the head of the office, could attend; one who could go to the Baltimore Club, and there in the quietness and comfort of that club put up these propositions in order to destroy competition." (1805)

"No, he [DeBaugh] didn't have a racing stable. [There is no evidence in the record that Mr. Zell or anyone else had a racing stable.] He didn't have another finance business. He didn't have the money by which he could go and put in such a front as Zell did." (1813)

"* * * Zell gets the favors, because somewhere he has the money. He can go to the Baltimore Golf Club and he can entertain." (1813)

"* * * They are ashamed of themselves. Just as Porter was ashamed when he went up to DeBaugh and misrepresented as he did what the truth was. He went back to Zell and said, Give this man a little something, be gracious and drop him a crumb from the riches of your table." (1816)

6. The verdict as to liability is based upon speculation, surmise and conjecture.

7. The verdict as to damages is based upon speculation, surmise and conjecture.

8. The Court erred in denying defendants' motion for a mistrial.

9. The Court erred in holding insufficient defendants' Sixth Defense.

10. The Court erred in excluding evidence as follows:

(a) In stating in open court, in the course of the presentation of evidence, that the Court did not see the relevancy of Defendants' Exhibits 81-I and J and 81-C, thus, in effect, excluding such exhibits from consideration by the jury although they are highly relevant and important to the defense and were admitted without objection.

(b) In excluding from evidence Defendants' Exhibits 78, 79 and 80 for identification.

[3407] (c) In sustaining an objection to the following question put on the direct examination of Donald D. Webster (1380):

> "Q. Didn't you know as a matter of fact that Judge Holtzoff had not made a ruling on that matter, but affirmatively stated that——"

Defendants made the following offer of proof (1386):

> "Mr. Denit: We offer to prove that he knew that Judge Holtzoff did not make that ruling, and that his contention to the judge in Baltimore was not true."

11. The Court erred in granting, over defendants' objection, Plaintiffs' Prayers for Instructions 1, 8, 10, 10A, 11 and 12, and in denying Defendants' Prayers for Instructions 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34.

12. The Court made the following errors in its charge to the jury:

(a) Permitting the case to go to the jury on the theory of a violation of the monopoly provisions (Section 2) of the Sherman Act.

(b) Instructing the jury that defendants admitted that Packard refused to renew plaintiff's Dealer's Sales Agreement.

(c) Permitting the jury to find that defendants caused injury to plaintiff if Packard's offer of renewal of Plaintiff's Dealer's Sales Agreement was not made in good faith because of a mental reservation to cancel the franchise at the end of another year.

(d) Instructing the jury that defendants' motive in making Zell the sole dealer in Baltimore was immaterial.

(e) Instructing the jury that the measure of damages is the value of plaintiff's business on March 31, 1952, and the evidence of value would be profits plaintiff might reasonably have anticipated during a reasonable period of time.

[3408] (f) Instructing the jury that it might consider the fact that franchises of "efficient" dealers ordinarily are renewed from year to year and refusing to instruct the jury that plaintiff had a one-year contract only, with no right to renewal.

(g) Refusing to tell the jury that defendants contended that plaintiff's average annual automotive profit was about $4,000 per year as shown by Defendants' Exhibit 81-D, although the jury had been told what plaintiff claimed for loss of profits.

HUGHES, HUBBARD, BLAIR & REED
One Wall Street
New York 5, New York

By: HAROLD L. SMITH

WILKINSON, BOYDEN, CRAGUN & BARKER
744 Jackson Place, N.W.
Washington 6, D. C.

By: ROBERT W. BARKER

Attorneys for Defendants

LOUIS M. DENIT
Of Counsel.

[3467] (Filed Oct. 25, 1955)

Affidavit in Support of Defendants' Motion for a New Trial

DISTRICT OF COLUMBIA, SS:

ROBERT W. BARKER, being duly sworn, deposes and says:

I am an attorney at law admitted to practice before the United States District Court for the District of Columbia and other courts and am a member of the firm of Wilkinson, Boyden, Cragun & Barker, one of counsel for defendants Studebaker-Packard Corporation (formerly Packard Motor Car Company), Marshall G. Beck and C. M. Porter, defendants in the above-entitled action.

This affidavit is for the purpose of bringing to the attention of the Court certain circumstances bearing on defendants' right to have the jury instructed in accordance with defendants' prayer for instruction No. 33.

The requested instruction is as follows:

> "Under the anti-trust laws the Court is required to multiply by three any damages awarded by the jury. If you bring in a verdict for plaintiff, it must be only for single damages."

A part of the colloquy relating to defendants' prayer for this instruction was as follows (Tr. 1837-9):

> "MR. SMITH: * * *
>
> "Your Honor, there is serious risk that the jury might feel that having decided what it regards as actual damages, it must then treble them.
>
> "MR. LEAHY: I think nothing should be mentioned about it.
>
> "MR. SMITH: We have a citation on that, if Your Honor please.

Affidavit in Support of Defendants' Motion for a New Trial

[3468] "THE COURT: Let me have the case now.

"MR. BARKER: The citation that is appended to our Prayer No. 33, Your Honor.

"It is the usual practice to give such an instruction.

"THE COURT: I have never heard of it.

"MR. SHAPIRO: It is the case of Cape Cod Food Products versus National Cranberry Association, 119 Federal Supplement 900, at page 911.

"MR. SMITH: We do not take the position that the Court made any determination in that case upon that type of instruction, but we believe that that type of instruction was given in that case.

"THE COURT: Oh, well, that is a different proposition.

"MR. LEAHY: Directly in point was Judge Bailey's instruction to counsel in the case here in the District of Columbia of Student Law Book Company versus Washington Law Book Company in which he instructed counsel not to say anything about the fact that it was treble damages. That was an antitrust case.

"THE COURT: What case was that?

"MR. LEAHY: Student Law Book Company versus Washington Law Book Company.

"THE COURT: Is that a recent case?

"MR. LEAHY: Oh, yes.

"THE COURT: I have a very high regard for Judge Bailey.

"MR. LEAHY: And Judge Bastian followed that same rule.

"MR. SMITH: We are not taking the position that counsel should mention the fact to the jury. We are taking the position that in order to protect the defendant from prejudice the jury ought to be instructed that it is not the function of the jury to treble the damages, because it is common knowledge

that treble damages are awarded in this kind of action, and the jury understands it as well as anybody else.

"THE COURT: I understand your position, and I deny your request. * * *"

Thus, in denying defendants' prayer No. 33, the Court apparently relied upon Mr. Leahy's representation to the Court that in the *Student Law Book* case Judge Bailey had made a ruling "directly in point" by an "instruction to counsel" in that case [3469] not to say anything about treble damages. The Court's action in relying upon Mr. Leahy's representation was a departure from Judge Holtzoff's practice. Judge Holtzoff had described his practice in the following colloquy in which he criticized Donald Webster's statement to the Maryland court about Judge Holtzoff's position regarding the relevancy of the alleged pre-war conspiracy (Tr. 1382):

"THE COURT: * * *

* * *

"Now, this gentlemen, demonstrates the desirability of something I always do. I do not permit any lawyer to quote what any other judge said unless it is down in writing.

"MR. LEAHY: That is right.

"THE COURT: I never permit an oral statement of what some other judge held or stated, because, as I have told other members of the bar time and time again, you may put a wrong emphasis on what a judge said in the next courtroom, and out of courtesy to Judge A I am not going to permit you to do that unless you have it down in writing. * * *"

The following course of events which occurred after the trial shows, I believe, that Judge Bailey did not make

the ruling attributed to him by Mr. Leahy, who was counsel for the defendant in the *Student Law Book* case, and that Mr. Leahy's representation upon which this Court apparently had relied was incorrect:

Mr. Leahy repeated his representation concerning a ruling by Judge Bailey in the argument on the motion for a new trial. The entire colloquy in this connection was as follows:

> "MR. LEAHY: [Starting his answering argument]. Very briefly, if Your Honor pleases, and perhaps not in the order in which the points were addressed to Your Honor's attention on the argument by counsel for the defendants, but upon the theory that the latest argued are clearest before us, may I say that I recall very definitely a case which is still in our Court here in which the same point was made with regard to the right of the defendant to have it mentioned to the jury that the damages might be trebled under the law? It was tried before Judge Bailey. And as Your Honor and we all know, he is one of the oldest judges, perhaps, on any bench in the United States; and he said distinctly at that time that in his judgment it was the law it should not be mentioned; that it was none of the jury's business.
>
> [3470] "THE COURT: Of course, I have a very high regard for Judge Bailey. He has been on the bench since the Woodrow Wilson administration, and he is the oldest district judge, not only in years but in service, on the federal bench today.
>
> "MR. LEAHY: The name of that case is Students' Book Company versus the Washington Law Book Company. And there nothing was allowed to be said about treble damages, because it is none of the jury's business. It is a matter which Congress incorporated in the statute.
>
> "THE COURT: Is there a transcript of Judge Bailey's ruling?

"MR. LEAHY: I believe that can be had, yes.

"THE COURT: I would be glad to have it.

"MR. SMITH: And might we have a copy of it?

"THE COURT: Of course.

"MR. LEAHY: Certainly.

"THE COURT: This Court does not accept any document from any counsel unless a copy of it is furnished to opposing counsel.

* * *

"MR. SMITH: [In rebuttal]. Mr. Leahy referred to the Student Law Book case as a case where the judge ruled that the jury should not be told about trebling. Since he was counsel for the defendant in that case, he certainly knows more about it than I do. I have been informed—and if my information is incorrect, he can state so—that in that case the plaintiff asked that nothing be said to the jury about trebled; and Mr. Leahy, counsel for the defendant, had no objection to that. That being so, there was no issue on that point in that case.

"THE COURT: I still would like to have a copy of Judge Bailey's ruling, if it can be procured.

"When was that trial, Mr. Leahy?

"MR. LEAHY: The trial was two years ago, I think; and my recollection of it was that Judge Bailey called us both to the bench and said he didn't care to have anything mentioned about it; that there was no request.

"THE COURT: It seems to me there should be no difficulty in procuring that transcript. I should like to have it done in the next day or so, because I am going to get to work on this right away.

"MR. LEAHY: Yes, Your Honor. I will try to find it.

"THE COURT: And furnish a copy of it to Mr. Smith, if you will, please.

"Go ahead, Mr. Smith."

Affidavit in Support of Defendants' Motion for a New Trial

[3471] Mr. Smith's statement as to what had occurred before Judge Bailey was a correct statement of information obtained from counsel for the plaintiff in the *Student Law Book* case.

Although the facts stated by Mr. Smith refuted Mr. Leahy's representation as to what had occurred before Judge Bailey, Mr. Leahy did not deny the correctness of Mr. Smith's statement, but undertook to give the Court and the defendants' counsel copies of the appropriate portion of the transcript of the minutes in the *Student Law Book* case.

The foregoing occurred on October 10, 1955. On October 20, 1955, not having received anything from Mr. Leahy, defendants' counsel delivered the following letter to Judge Holtzoff's chambers:

"October 20, 1955

"Hon. Alexander Holtzoff
United States District Court
Washington, D. C.

Re: *Webster Motor Car Co.* v. *Packard Motor Car Co.*, No. CA 674-53

"Dear Judge Holtzoff:

"We have not yet received from Mr. Leahy a copy of the portion of the transcript of the record in the *Student Law Book* case which the Court requested Mr. Leahy to file, with a copy to us, in connection with our motion for a new trial in the above case.

"When we have had an opportunity to examine what Mr. Leahy files, we may wish to file a memorandum or affidavit in response. We should appreciate the Court's giving us an opportunity to do this before decision of the motion for a new trial.

Affidavit in Support of Defendants' Motion for a New Trial

"We are sending a copy of this letter to Mr. Leahy.

"Respectfully,

"WILKINSON, BOYDEN, CRAGUN & BARKER

"By: Robert W. Barker

"cc: William E. Leahy, Esq.
821—15th St., N. W.
Washington 5, D. C."

[3472] On the same day, a copy of the foregoing letter was mailed to Mr. Leahy's office. About 11:30 a. m. on the following morning, Colonel Hughes, one of plaintiff's counsel, telephoned me and stated certain facts and events which had transpired some time prior to our letter, the substance of which, according to my best recollection of what Colonel Hughes said, is as follows:

Mr. Leahy had been unable to get the transcript in the *Student Law Book* case. He went to Judge Bailey's chambers and discussed the matter with Judge Bailey. Judge Bailey wrote a memorandum as follows:

"UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

"Chambers of Judge Bailey

October 13, 1955

MEMORANDUM:

re: *Student Law Book* v. *Wash. Law Book*

"My recollection is quite clear that the issue to be submitted to the jury was simply the question of

ordinary damage and that no reference was to be made in the testimony or argument or charge that if the damages were returned, the judgment would be entered for treble the amount.

"My recollection is also that counsel for plaintiff and defendant took the same view.

"/s/ Jennings Bailey

"P. S. I may add that the jury failed to agree in the case I tried and it was retried before Judge Bastian."*

[3473] Thus, Judge Bailey has confirmed the position taken by Mr. Smith at the argument that there was no issue before Judge Bailey as to the right of a defendant to have the jury informed about trebling. From the foregoing it is clear that Judge Bailey made no ruling on this point and that Mr. Leahy's representation upon which Judge Holtzoff apparently relied was incorrect.

There being no authority on the point in this Court and plaintiff's counsel having cited no authority, I respectfully submit that the Court should follow the authorities cited by Mr. Smith at the oral argument, which are as follows:

Bordonaro Bros. Theatres v. *Paramount Pictures,* 203 F. 2d 676, (2d Cir. 1953).

Eastman Kodak Co. v. *Blackmore,* 277 Fed. 694 (2d. Cir. 1921) (Record, p. 1373; charge of Judge Grubb).

Lowry v. *Tile, Mantel & Grate Ass'n of Cal.,* 106 Fed. 38, 46, (N. D. Cal. 1900); aff'd

*Counsel for the plaintiff in the *Student Law Book* case has informed me that what occurred before Judge Bastian on the retrial was substantially the same as what had occurred before Judge Bailey.

115 Fed. 27 (9th Cir. 1902); aff'd 193 U. S. 38 (1904).

Cape Cod Food Products, Inc. v. *National Cranberry Ass'n*, 119 F. Supp. 900, 911 (D. Mass. 1954).

The reason why this affidavit has not been filed earlier is that prior to their letter of October 20, 1955 and my telephone conversation with Colonel Hughes on October 21, 1955, defendants' counsel had not been informed and did not know of Mr. Leahy's unsuccessful attempt to obtain a copy of the transcript, or of Mr. Leahy's visit to Judge Bailey, or of the existence or content of Judge Bailey's memorandum, despite the fact that Judge Bailey's memorandum is dated October 13, 1955, and despite Judge Holtzoff's instructions to Mr. Leahy respecting the furnishing to defendants' counsel of a copy of what he might file.

ROBERT W. BARKER

Subscribed and sworn to before me this 24th day of October, 1955.

ANDREW T. PEPSIN
Notary Public, D. C.
My Commission Expires May 14, 1957

[3475] **Opinion Denying Motions**

William E. Leahy and William J. Hughes, Jr., both of Washington, D. C., for plaintiffs.

Harold L. Smith, of New York, N. Y.; Louis M. Denit and Robert W. Barker, both of Washington, D. C., for defendants.

Opinion Denying Motions

This case is before the court at this time on motions by the defendants for judgment notwithstanding the verdict or, in the alternative, for a new trial.

This action was brought to recover triple damages under the Antitrust laws.[1] The plaintiff was one of several dealers in Packard automobiles in Baltimore, Maryland, pursuant to a contract with the defendant [3476] Packard Motor Car Company. The plaintiff claims that as a result of a conspiracy between this defendant and a rival dealer, it was unlawfully deprived of its contract, and the competitor was made an exclusive dealer in Packard cars in the Baltimore area. After a trial on the merits the jury returned a verdict for the plaintiff for the sum of $190,000. Pursuant to the mandatory direction of the statute, the court ordered judgment to be entered for three times that amount, namely, $570,000.[2]

The basic questions raised by the motion for judgment notwithstanding the verdict are: first, whether there was substantial evidence justifying the submission of the case to the jury on the issue of liability; and second, whether there is substantial evidence to sustain the verdict of the jury as to the amount of damages.

It is an elementary rule that on such motions the evidence must be viewed from the standpoint most favorable to the prevailing party.[3] Some of the evidence introduced at the trial was conflicting. The jury would have been justified, however, in finding the following facts from the evidence adduced in behalf of the plaintiff.

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[1] 15 U. S. C. A. 15.

[2] This is the procedure generally followed in such cases, *Twentieth Century-Fox F. Corp.* v. *Brookside Theater Corp.* (C. C. A. 8th) 194 F. (2d) 846, 849; *Bordonaro Bros. Theatres, Inc.* v. *Paramount Pictures* (C. C. A. 2d) 176 F. (2d) 594, 596.

[3] *Baltimore & Ohio Ry. Co.* v. *Postom*, 85 App. D. C. 207; 177 F. (2d) 53.

The defendant Packard Motor Car Company is a manufacturer of automobiles. It sells its product through dealers located at various points throughout the country. Every dealer operates under a contract with the defendant, sometimes known as a franchise. Such a contract runs for [3477] the period of one year, but the usual practice of the defendant is to renew it from year to year so long as the dealer's services are satisfactory. For a number of years there were four Packard dealers in Baltimore, Maryland, of whom the plaintiff, Webster Motor Car Company, was one. The plaintiff's contract was continued from year to year over a considerable period. In fact, when on one occasion the plaintiff's plant burned down as a result of a disastrous fire and the plaintiff had some doubt whether to rebuild or to go out of business, the defendant encouraged the plaintiff to pursue the former course and, in fact, assisted it in the preparation of architect's plans for reconstructing its building. It was reasonable to infer that under ordinary circumstances the plaintiff's contract would have been renewed from year to year as long as its services were satisfactory, and as long as it wished to remain in business as a dealer in Packard cars. In course of time, one of the four dealers in Baltimore, gave up its franchise. Consequently at the crucial period involved in this case, there were three Packard dealers in that city. They were the plaintiff, the Zell Motor Car Company, and DeBaugh Motors. The plaintiff continually operated at a profit, although the amount of the profit varied considerably from year to year.

In the winter of 1952, Sidney Zell, the President of the Zell Motor Car Company, approached the defendant Packard Motor Car Company, and informed its officials that his company was operating at a loss and would not continue to sell Packard cars unless the defendant gave it an exclusive contract and eliminated all rival dealers. After some con-

ferences among themselves, the Packard officials [3478] decided to agree to Zell's proposal and so informed him. In order to carry out this scheme, Packard representatives apprised DeBaugh that his franchise would not be continued. They also informed the plaintiff that its contract would not be renewed, without advancing any ground for this action. Richard Webster, the President of the plaintiff corporation, implored the defendant to reconsider, expressing his desire to continue as a Packard dealer, inquiring whether there was any dissatisfaction with his performance, and offering to make changes and improvements in any manner desired by Packard. The latter declined to give any reason whatsoever for its attitude, but remained adamant. When the plaintiff continued its protests, Packard finally offered to renew its franchise for one year. The plaintiff countered by requesting some assurance of good faith, as apparently it had become suspicious. Zell, on the other hand, secretly protested to Packard against its offer to renew the Webster franchise for one year, and the Packard officials in effect told him that this renewal would be the last so far as Webster was concerned, without, however, giving this information to Webster. The latter wound up its Packard business and tried to sell cars of a different make. Apparently it was not successful. The Webster Motor Car Company then discontinued business altogether. Its claim in this action is based on the contention that the arrangement between Packard and Zell constituted a constituted a conspiracy violative of the Antitrust Laws. The plaintiff sought to recover triple damages suffered as a result of being allegedly driven out of business in the manner above outlined.

The principal question is whether the foregoing facts constitute a contract or conspiracy in unreasonable [3479] restraint of interstate commerce or a combination or con-

spiracy to monopolize any part of interstate commerce, or whether the defendant acted within its legal rights.

Unquestionably, a business concern has a right to select its own customers. It has the privilege of selling its products to whomever it chooses, to refrain from dealing with anyone, and to prefer one potential customer over another. Consequently, if the Packard Motor Car Company of its own initiative, for whatever reasons it deemed best, determined that thereafter there should be only one Packard dealer in Baltimore, who would receive an exclusive franchise, and that this dealer should be the Zell Motor Car Company, there would probably have been no violation of the antitrust laws.[4] That is not this case, however. The right to select one's customers is a right that may be exercised free from compulsion and without agreements with others that tend unreasonably to restrain interstate commerce or to create a monopoly. Such a choice may not legally result from an agreement or arrangement or conspiracy between two or more individuals, or two or more business concerns, to exclude others from the channels of trade, or to attempt to create a monopoly or substantial monopoly for one of the parties to the agreement.[5] The purpose of the antitrust laws is to keep the channels of competition open and free and to prevent their becoming [3480] blocked by agreements to force competitors from the field. If as a result of greater energy or efficiency, Zell had acquired a larger share of the business and the plaintiff had fallen by the wayside, the latter would not have had any basis for com-

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[4] *G. & P. Amusement Co.* v. *Regent Theater Co.* (N. D.-Ohio) 107 F. Supp. 453, aff. 216 F. (2d) 749; *Boro Hall Corporation* v. *General Motors Corporation*, 124 F. (2d) 822; *Hudson Sales Corp.* v. *Waldrip*, 211 F. (2d) 268.

[5] *Twentieth Century-Fox F. Corp.* v. *Brookside Theater Corp.* (C. C. A. 8th) 194 F. (2d) 846; *Bordonaro Bros. Theatres* v. *Paramount Pictures* (C. C. A. 2d) 176 F. (2d) 594.

plaint. The law, however, does not countenance agreements to drive a competitor out of the market by artificial means. An agreement to exclude a rival is of an entirely different nature from free competition that may indeed at times result in economic death for one of the competitors.

This line of demarkation was aptly drawn as follows by Judge Freed in *G. & P. Amusement Co. v. Regent Theater Co.*, (N. D.-Ohio) 107 F. Supp. 453, 463, whose decision was affirmed by the Court of Appeals for the Sixth Circuit, 216 F. (2d) 749:

> "The opportunity of a business entity, when acting without ulterior motives and *free from compulsion*, to sell its product to one potential customer in preference to another, exemplifies precisely the type of economic system upon which American business thrives. This Court has never regarded the Sherman Act as an instrument requiring a dealer in commodities to sell to all comers, when to do so will be to run the risk of destroying a good customer by selling to another when it is simply an economic impossibility for both to exist—*provided, of course, that there is no wrongful use of monopoly power or conspiracy to restrain trade.*" (Emphasis supplied.)

The applicable rules of substantive law are found in the Sherman Act and read as follows:

> "Every contract, . . . or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal: . . ."[6]
>
> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, . . . shall be deemed guilty of a misdemeanor."[7]

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[6]Section 1 of the Sherman Act, 26 Stat. 209; 15 U. S. C. A. 1.
[7]Section 2 of the Sherman Act, 26 Stat. 209; 15 U. S. C. A. 2.

[3481] It is well established that the first of the foregoing sections must be construed as through it read, "Every contract or conspiracy in *unreasonable* restraint of trade or commerce, is declared to be illegal."[8] The term "conspiracy" is of course not to be interpreted as though it had an opprobrious connotation. It means merely an agreement or contract forbidden by law.

In the case at bar the court submitted to the jury the issue as to what the facts were, as well as the determination of the ultimate fact,—whether the transaction constituted an unreasonable agreement in restraint of trade among the several States, or an agreement to attempt to monopolize. The jury by its verdict found that such an illegal agreement existed. This it had a right to do. It had a right to reach the conclusion that an agreement on the part of the manufacturer with one of its own dealers to terminate the franchise of all competitors and to grant to him a monopoly within a certain area, is an agreement in unreasonable restraint of trade, or an agreement to monopolize.

Since Packard automobiles are manufactured outside of the State of Maryland and are shipped by Packard to its dealers in Baltimore, interstate commerce was obviously affected. The jury was also justified in finding from the evidence that the agreement involved in this action substantially restrained competition. Evidence was introduced [3482] tending to show that in addition to competition among dealers in different makes of motor vehicles, there is competition among dealers selling automobiles of the same make, such competition involving allowances on used cars turned in as part payment for new vehicles, terms of sale, and efficiency of service. Competition of this second

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[8] *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106.

type was manifestly eliminated, or at least substantially diminished, by the arrangement in question, insofar as sales of Packard cars in the Baltimore area were concerned.

The court, therefore, concludes that there was substantial evidence justifying the submission of the case to the jury on the issue of liability. There remains for consideration the problem whether there is substantial evidence to sustain the verdict as to the amount of damages.

The law on this question is clear. Necessarily, the amount of damages to be awarded must be based on evidence. It must be such sum as would fairly and reasonably compensate the plaintiff for the pecuniary loss that it has sustained. The jury may not speculate *in vacuo* or guess at an amount, or fix damages arbitrarily. On the other hand, it is sufficient if the evidence supplies information from which the jury may arrive at an approximate amount of damages that the plaintiff probably sustained, as a matter of reasonable inference. It is not necessary to show the precise sum that the plaintiff has lost, because ordinarily such an exact computation is not feasible. The law does not require the impossible, for otherwise a wrongdoer might entirely escape liability for damages caused by his illegal acts. The risk of [3483] uncertainty is to be thrown on the wrongdoer, rather than on the injured party. It is enough if the evidence shows the extent of the damages as a matter of reasonable inference, even though the result may be only approximate. The jury may form a reasonable estimate of the probable loss in the exercise of its good sense and sound judgment on the basis of the evidence.[9]

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[9] *Eastman Co.* v. *Southern Photo Co.*, 273 U. S. 359, 379; *Story Parchment Co.* v. *Patterson Co.*, 282 U. S. 555, 563; *Bigelow* v. *R. K. O. Pictures*, 327 U. S. 251, 264; *Twentieth Century Fox F. Corp.* v. *Brookside Theater Corp.* (C. C. A. 8th) 194 F. (2d) 846 855.

In this case the court instructed the jury that the measure of damages was the value of the plaintiff's business claimed to have been destroyed by the defendant's illegal acts. The evidence that enabled the jury to evaluate the loss consisted of proof of the amount of profits realized annually by the plaintiff from its automobile business during the period beginning in 1946 and ending in 1952, when the plaintiff discontinued the sale of Packard automobiles, coupled with a showing that the plaintiff then had an unexpired term of over seven years on the lease on its plant. In addition, evidence was introduced tending to show that in 1952, the automobile business generally was at an up-swing; that the plaintiff's annual profits were gradually increasing; and that the outlook for further growth was good, because the defendant had introduced a new model that was meeting with public favor. The defendant, on the other hand, disputed the [3484] plaintiff's computation of its profits, and also introduced evidence tending to show that in 1953, many Packard dealers whose business was of approximately the same size as the plaintiff's, sustained a loss instead of realizing a profit. The evidence on both sides created a question of fact, which the jury resolved in the plaintiff's favor. On this basis, the verdict of $190,000 was entirely within the bounds of reason and is sustained by the evidence.

On the motion for a new trial, the defendant advanced several additional propositions, three of which warrant a brief notice.

The court denied the defendant's request that the jury be informed that the amount of damages that would be awarded by it would be multiplied by three by the court. The court instructed the jury as follows:

> "The damages to be awarded by the jury should be in such amount as would in the opinion of the jury

> fairly and reasonably compensate the plaintiff for the financial or pecuniary loss to its business,—in other words, the amount of money that the plaintiff lost in its business as a result of the illegal acts of the defendant."

The court further stated:

> "The measure of damages in this case is what was the value of the plaintiff's business claimed to have been destroyed by the defendant's illegal acts."

There was no reason for informing the jury that whatever damages they would award would be trebled, because this is a matter solely for the court. In fact, the jury might have taken such a statement as an intimation to keep the damages at a low level, in view of the fact that the amount allowed by the jury would be multiplied by three. [3485] This would have tended to defeat the purpose of the Act of Congress.

In this connection, it must be noted that it is the practice in this jurisdiction in civil cases not to give the pleadings to the jury. The custom is otherwise in criminal cases, as the indictment is generally handed to the jury. There may be some reason for imparting the information to the jury in those districts in which it is customary to supply the pleadings to the jury in civil cases, because otherwise the jury on reading the prayer for relief might be confused by the demand for triple damages and might be perplexed by a doubt whether it was its duty to multiply the actual damages by three.

Associate counsel for the defendant has selected a single ruling on a minor question of evidence out of a great many made during the three-weeks' trial, and has urged that the court erred in excluding a certain question on cross-examination. The importance of the question is magnified

out of its context, and even if its exclusion were erroneous, the error would have been harmless. The matter would not be of sufficient importance to justify a new trial, as it could not possibly have affected the outcome of the trial. Actually, however, upon further reflection the court adheres to the ruling made at the trial. The defendant called as its witness one Donald Webster, the son of Richard Webster, the President of the plaintiff corporation. A series of questions were addressed to the witness that obviously were not germane to the issues involved in this case, and whose only effect seemed to be to embarrass him. The court nevertheless permitted the interrogation to proceed for awhile, not knowing whether [3486] it might result in developing something material. Finally the question was asked whether in another proceeding in another court, the witness had not misstated something that had occurred on an interlocutory motion in this case in this court. The court excluded the question on the ground of its irrelevancy. It served no legitimate purpose and merely seemed to humiliate the witness. The court is not unmindful of the fact that under Rule 43(b) of the Federal Rules of Civil Procedure, the witness might well have been regarded as a hostile witness and, therefore, was subject to cross-examination by defendant's counsel even though the witness was called by the defendant. Nevertheless, it must not be overlooked that in a Federal court the extent of cross-examination as to credibility is subject to the reasonable control of the court, and may not be carried to whatever extent counsel desires.

The comments of the Court of Appeals in *Bracey* v. *United States*, 79 U. S. App. D. C. 23, 27, although directed to another aspect of the law of evidence, are equally applicable to the case at bar:

> "In fact, the situation of the present case provides a good example of the necessity for permitting

> the trial judge to exercise considerable discretion in admitting or rejecting evidence. He observes the conduct of counsel, the reactions of the witness under examination and the resulting effect upon the jury. In other words, he is aware, as no appellate court could be, of the courtroom psychology and, hence, is in a position to determine whether particular testimony should or should not be received."

Finally, defense counsel complains of the summing up argument to the jury made by counsel for the plaintiff, and urges that it was inflamatory. It may be observed [3487] that both parties were represented by experienced trial counsel, who are members of the local bar of high standing. Each of them, as able trial lawyers are wont to do, indulged in flights of eloquence in his summing up to the jury with considerable skill. Neither counsel interposed any objection to the summing up of his opponent, either during the speech or after its conclusion. While the fact that no objection was advanced at the time, is not necessarily fatal if a miscarriage of justice has really resulted, nevertheless, this circumstance gives rise to a mental inquiry whether the contention later made is not an afterthought. Especially is this the case because the motion for a new trial was not argued by the trial counsel, although he was present in the courtroom at the time of argument, but was presented by out-of-town counsel who was associated with the trial counsel and who was admitted *pro hac vice*. In any event the court is of the opinion that the summation of each trial counsel was within the bounds of proper advocacy and that neither was inflamatory. Fortunately, we have not reached the stage of banning interesting and vivid oratory and confining arguments of counsel strictly to dull and prosaic remarks. The art of advocacy is not dead, although it must be confessed that at times it seems moribund. So, too, only one who has but little

faith in trial by jury would really think that jurors are easily led astray by eloquence from the course charted by the evidence. The general experience of Federal trial judges is to the contrary. The effect of skillful summation of counsel is rather to silhouette or etch vital portions of the facts and the inferences to [3488] be drawn from them.[10]

It would be wise to bear in mind the sage and apt remarks of Judge Goodrich of the Third Circuit, in commenting on a similar contention in *Smith* v. *Philadelphia Transp. Co.*, 173 F. (2d) 721, 726, which are equally applicable here. He said:

> "Juries are not so likely to get excited or inflamed by lawyers' talk as lawyers think they are."

That the jury in this case reached its conclusion on the evidence and displayed keen discernment in considering and weighing it, is demonstrated by a rather significant episode. After several hours of deliberation, the jury sent a note to the court requesting to see a certain exhibit, which the note identified with precision, in spite of the fact that over two hundred exhibits had been introduced during the protracted trial. The exhibit was a document on which the question of defendant's liability largely hinged.

The motion for judgment notwithstanding the verdict and the motion for a new trial, are denied.

ALEXANDER HOLTZOFF
United States District Judge

October 25, 1955.

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[10] *Coleman* v. *Moore* (D. C.) 108 F. Supp. 425, 426.
Chapman v. *Alton R. Co.* (C. C. A. 7th) 117 F. (2d) 669, 672.
Chesapeake & O. Ry. Co. v. *Richardson* (C. C. A. 6th) 116 F. (2d) 860, 865.
Green v. *United States* (C. C. A. 8th) 266 Fed. 779, 784.
DiCarlo v. *United States* (C. C. A. 2d) 6 F. (2d) 364, 368 (Learned Hand, J.).

Order Overruling Motion for New Trial
Notice of Appeal

[3561] (Filed Oct. 25, 1955)

Order Overruling Motion for New Trial

Upon the coming on for hearing of the motion filed herein by Defendants, for a new trial, it is this 25th day of October, 1955, ordered that said motion be, and the same is hereby overruled.

HARRY M. HULL, *Clerk*,

By JOHN F. BURKE,
Deputy Clerk.

By direction of

JUDGE ALEXANDER HOLTZOFF

[3564] (Filed Nov. 23, 1955)

Notice of Appeal

Notice is hereby given this 23rd day of November, 1955, that defendants Packard Motor Car Company (now named "Studebaker-Packard Corporation"), Marshall Beck and C. M. Porter, and each of them, hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 21st day of June, 1955, in favor of plaintiff The Webster Motor Car Company against said defendants; and from the order entered on the 22nd day of November, 1955, awarding attorneys' fees to said plaintiff in accordance with the decision of this Court rendered on the 30th day of June, 1955; and that the appeal will include review not only of said judgment and

said order but also of the opinion and orders entered on the 25th day of October, 1955, denying said defendants' motions (made on the 1st day of July, 1955) for judgment under Rule 50(b) and for a new trial.

HUGHES, HUBBARD, BLAIR & REED
One Wall Street
New York 5, New York
By HAROLD L. SMITH, A Partner

[3565] WILKINSON, BOYDEN,
CRAGUN & BARKER
744 Jackson Place, N. W.
Washington 6, D. C.
By ROBERT W. BARKER, A Partner

Attorneys for Defendants Packard Motor Car Company (now named "Studebaker-Packard Corporation"), Marshall Beck and C. M. Porter

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[3563] (Filed Nov. 23, 1955)

Notice of Appeal

Notice is hereby given this 23rd day of November, 1955, that plaintiff, The Webster Motor Car Company hereby appeals (cross-appeals) to the United States Court of Appeals for the District of Columbia from that part of the judgment of this Court fixing the amount of counsel fees entered on the 21st day of June & November 22, 1955 in favor of THE WEBSTER MOTOR CAR COMPANY against said PACKARD MOTOR CAR COMPANY, MARSHALL BECK AND C. M. PORTER.

WILLIAM E. LEAHY
WM. J. HUGHES, JR.
Attorneys for Plaintiff
The Webster Motor Car Company

Designation of Contents of Record on Appeal
Order for Transmission of Original Record

[3568] (Filed Dec. 14, 1955)

Designation of Contents of Record on Appeal

The parties hereto by their respective attorneys stipulate and agree, pursuant to Rule 75(f) F. R. C. P. to designate and do hereby designate the entire record and all proceedings and evidence including but not limited to the reporter's transcript of testimony and proceedings and exhibits in this case as the record on appeal (and on cross-appeal) to the United States Court of Appeals for the District of Columbia.

William E. Leahy
Wm. J. Hughes, Jr.
Attorneys for Plaintiffs
The Webster Motor Car
Company and
Richard C. Webster

HUGHES, HUBBARD, BLAIR & REED
By Harold L. Smith, A Partner

WILKINSON, BOYDEN, CRAGUN &
BARKER
By Robert W. Barker, A Partner

Dated: December 14, 1955.

[3569] (Filed Dec. 14, 1955)

Order for Transmission of Original Record

On the joint motion of the parties to the above entitled action, and pursuant to Rule 75(i) of the Federal Rules of Civil Procedure, it is

ORDERED this 14th day of December, 1955, that the clerk of the above entitled Court transmit, in lieu of copies, the original papers and exhibits hereinbefore jointly designated by the parties to constitute the record on appeal (and on cross-appeal) of this cause to the United States Court of Appeals for the District of Columbia Circuit.

ALEXANDER HOLTZOFF
District Judge

Excerpts from Trial Transcript

[1] The above-entitled cause came on for trial before Honorable ALEXANDER HOLTZOFF, United States District Judge, and a jury, at 1:45 o'clock p.m.

APPEARANCES:

On behalf of plaintiffs:

WILLIAM E. LEAHY, Esq.
WILLIAM J. HUGHES, Esq.

On behalf of defendants Studebaker-Packard Corporation (formerly Packard Motor Car Company): Marshall Beck, C. M. Porter and Samuel Howell:

WILKINSON, BOYDEN, CRAGUN & BARKER, by ROBERT W. BARKER, Esq.

HUGHES, HUBBARD, BLAIR & REED, by HAROLD L. SMITH, Esq., and JEROME G. SHAPIRO, Esq.

BRANDENBURG & BRANDENBURG, by LOUIS M. DENIT, Esq.

* * *

[2] Mr. Smith: We have a motion to amend the answer so as to add a sixth affirmative defense. The motion was served on May 10th, and the points and authorities in support of it on May 12th.

The Court: What is the defense?

Mr. Smith: A defense that the defendants have been released in whole or in part by reason of what has occurred in an action commenced by these plaintiffs in the United

States District Court for Maryland. In the Maryland action the plaintiffs sued Zell Motor Car Company, and certain individuals, all of whom are named as defendants in this case.

[3] The claim asserted there is the same as the claim asserted in this case. The plaintiffs' attorneys in the Maryland action are Messrs. Leahy and Hughes, who are attorneys for the plaintiffs here, and Donald Webster, who is a son of the individual plaintiff, and vice president and director of the corporate defendant. On April 29, 1955 there was entered in the Maryland action a consent order, a copy of which is annexed to our motion. That order provided for a dismissal of the Maryland action with prejudice upon the disposition of the present action other than for lack of jurisdiction. After the entry of that order, plaintiffs made a motion in the Maryland action to vacate or modify the order on the ground that the order might operate as a release of the defendants in the present action. That motion was denied. That motion was argued by Mr. Donald Webster and Mr. Hughes. I would like to read to the Court a paragraph or two of what was said at that time.

The Court: I don't think I should pass upon the merits of the defense at the moment. What you are requesting now is leave to amend your answer in order to assert that defense. Any objection to that?

Mr. Leahy: The only objection would be, if Your Honor please, I suppose sometime we will have to argue it on [4] the merits.

The Court: You would, but I think they should be allowed to amend their answer. Leave to amend the answer is granted.

* * *

[9] (Thereupon the following jurors and alternates were impaneled and sworn to try the issues joined:)

1. Yvette M. Binetta
2. Audrey M. Carey
3. Mildred Cuddy
4. Eugene A. Ford
5. Dolores D. Hagans
6. Louise C. Hager
7. Elvira A. Kannenberg
8. Mildred O. Kelly
9. Ola D. Lee
10. Julia B. Richardson
11. Mary L. Ryals
12. Bertie B. Tipton

Alternate No. 1—Raymond Babigan

Alternate No. 2—Mitchell A. Brooks.

* * *

[10] The Court: * * *

Ladies and gentlemen of the jury, before we commence this trial I want to remind you that while this trial is in progress you must not discuss this case with anyone, not even amongst yourselves, not even at home with members of your families. Please keep an open mind until the trial is finished and the matter is submitted to you for final decision.

* * *

[44] Mr. Denit: On the opening statement of counsel for the plaintiff, we move the Court to direct a verdict insofar as the plaintiff Richard Webster is concerned, because there is no indication of any proof that Mr. Webster personally suffered any loss as the result of the action complained of.

Mr. Leahy: I can't go into all that right now on the opening statement and give all the details. I have always had my doubts as to whether he was properly in there.

The Court: I had some doubt as to whether Richard Webster had a cause of action because it seems to me that the cause of action in behalf of Webster Motor Car Company, if there was an illegal conspiracy in violation of the Sherman Act, then this victim of that conspiracy was Webster Motor Car Company and not its individual stockholders and officers.

[45] I am inclined to grant the motion, but I will hear you if you care to present any argument on the matter.

Mr. Leahy: Frankly, my feeling is as Your Honor feels exactly. I can't find any authority either way.

The Court: I am going to direct a verdict in favor of the defendant as against the plaintiff Richard Webster. Let the case proceed in favor of only the corporate plaintiff, the Webster Motor Car Company.

* * *

[46] OPENING STATEMENT ON BEHALF OF THE DEFENDANTS

Mr. Denit: Ladies and gentlemen of the jury, in order that you may have both sides of this case at the very outset, and not simply be familiar with the contentions on one side, we deem it proper to acquaint you with our position in this matter and the bases upon which we rely as defenses to the claim. In the first place, this case is proceeding to trial against four defendants, although 14 defendants were named in the complaint. The only four defendants before you are the Packard Motor Company, Marshall Beck, Mr. Porter and Mr. Howell. None of the other defendants are before you for trial, and claims asserted against those other defendants are not involved here. The sole question that you ultimately will determine is whether or not the Packard Motor Company was a party to a conspiracy in violation of the Antitrust laws. We deny that there ever was any conspiracy.

We deny that there was any agreement to eliminate anybody, Webster included. We deny that the Packard Motor Company had any purpose, desire or intention to injure Webster, to injure the public. As a matter of fact, we expect [47] the evidence to show that the claims of an intention to injure him are utterly baseless.

* * *

[49] By the way, DeBaugh has nothing to do with this case, as the evidence will show, except that he was attempted to be used as an instrument in aid of Webster in the prosecution of this very lawsuit. DeBaugh had a small business located in the suburbs of Baltimore, and his sales were of no consequence so far as competition among other makes of cars [50] were concerned. Zell was the dealer who had been in business for some 50 years. He had the finest establishment in Baltimore. He had the largest investment of any dealer in Packard automobiles in Baltimore. He didn't go to Packard Motor Car Company, as the evidence will show, and say, "I want you to eliminate Webster." He said, in substance, "Gentlemen, I have sustained a loss for three years in this business. Unless some provision can be made by which I shall have a trial as the one dealer in Baltimore to get out of the red and make a profit, I will voluntarily retire." Mr. Zell, as you will observe him on the witness stand, said in the most graceful manner, "I will bow out gracefully." His proposition wasn't to eliminate Webster. His proposition wasn't to eliminate DeBaugh, but simply and solely unless some arrangement can be made whereby I will be given a trial as a sole dealer, I will quit the Packard motor business and retire. Packard was faced with a decision as to what it should do. For substantial business reasons it reached the conclusion that it would be proper to give Mr. Zell and his organization a trial. There

was never any agreement made as to when that trial should begin, the terms of the agreement, or anything of the sort. It was all merely tentative.

* * *

[57] (At the bench):

The Court: Both from the pretrial discussion that we have had, as well as from the opening statements, I gather that the evidence on which the plaintiff is going to [58] rely, except on the issue of damages, will come entirely from the files of the defendant so far as the documentary evidence is concerned, or from the mouths of the officers and employees of the defendant so far as oral testimony is concerned. If that is the case—I am just trying to envisage the progress of the case—probably there will not be much dispute over the salient facts upon which the plaintiffs seek to predicate their cause of action. As I understand the conspiracy, it is a conspiracy between Zell and Packard to take away the franchise from competing dealers and give Zell an exclusive franchise. So it looks to me as though eventually it will come down to a question of law as to whether those facts are or are not actionable under the antitrust laws, whether they do or do not constitute a violation of the antitrust laws. So that on the question of liability it is not unlikely, as I envisage the case, that it will probably go off on a directed verdict one way or the other.

Mr. Smith: I don't think I can conceive of it going off on a directed verdict for the plaintiff, Your Honor.

The Court: Why not? On the facts that I presume will be admitted.

Mr. Smith: No, I can't conceive of its going off for a verdict for the plaintiffs on any admitted fact, no, Your Honor.

* * *

[59] The Court: Of course, you have to say that. Your contention is that these facts do not constitute a cause of action. What I am trying to say to you, however, is that wouldn't the matter be a question of law for the Court to determine whether there is a cause of action or not? If I should rule that there is, then of course, the jury will have to determine the damages. If I hold that those facts do not constitute a cause of action, then there will be a directed verdict for the defendant. In other words, there can't be a directed verdict for the plaintiff in the sense that if there is a cause of action the jury has to fix damages. To that extent, there can't be a directed verdict. Is the picture as I tentatively see it correct? If it is, it seems to me that you ought to streamline the evidence as much as possible and stipulate the salient facts as much as possible, and shorten the trial that way.

Mr. Denit: We have already been over the documents that were offered—will be offered during the day.

The Court: You know, every case, no matter how complicated, comes down to one little salient issue. I haven't seen a case that doesn't. Sometimes it is difficult to get to that issue. Isn't the issue in this case this: Of course, I suppose that it will not be disputed that Packard in the exercise of its own judgment had a perfect right to say, "Now, [60] hereafter, we will have one exclusive dealer in the Baltimore area instead of having several, with an exclusive franchise." I don't suppose the other side will dispute that you had a right to do that. As I conceive the cause of action, it must be this: That while Packard had a right to do so if it made it as a free choice, and as a matter of business selection, that the plaintiff claims that when Zell came to Packard and said, "I won't handle Packard cars any more unless you take away the franchise from Webster and give me the exclusive franchise," and

Packard acquiesced, that was an unfair restraint of trade. Packard in a sense did not act voluntarily. Is this the contention?

Mr. Leahy: That's the contention.

The Court: Then it will come down to a question of law as to whether that is or is not a restraint of trade banned by the antitrust laws. Frankly, I do not know. I have read your memoranda and briefs very carefully. I haven't read all of the authorities here that you cite. I have read a considerable number of them. Frankly, none of those that I have read hit that specific point. This is what I suppose might be called in the antitrust laws a "vertical conspiracy" rather than a "horizontal conspiracy". Isn't that it?

Mr. Smith: I had supposed a vertical conspiracy [61] was a conspiracy between a company and its agents or employees or someone related to it.

The Court: No.

Mr. Leahy: It goes up, from dealer up to the manufacturers.

The Court: Yes. A horizontal conspiracy is concerning the same echelon. Like, for instance, a conspiracy between motion picture producers is a horizontal conspiracy. A conspiracy between motion picture producers and exhibitors would be in part horizontal, if there is more than one producer, and part vertical, insofar as they conspire with an exhibitor. Now, this alleged conspiracy, if it is a conspiracy, would be solely a vertical conspiracy, because it isn't a case of two people or more on the same echelon, each echelon combined, but the higher echelon is claimed to have combined with a lower echelon. So far as I have read the authorities, I have only read about a third of the authorities you have cited, I haven't run across a single case yet where there was a purely vertical conspiracy, in determining

the point whether a conspiracy such as this is or is not banned by the antitrust laws. If either side has any case on that precise point, I will be glad to have it cited.

Mr. Smith: I would suppose that some of the dealer [62] cases which we cite in our memorandum would comply with Your Honor's definition of a vertical conspiracy.

The Court: No.

Mr. Smith: Particularly the Feddersen case.

The Court: No, those cases that you cite do not hit the point. There was one case in which it was held that a manufacturer had a right to cancel the dealer's franchise unless the dealer complied with certain requirements, which is a little different.

Mr. Leahy: Oh, yes.

The Court: The cases that I have read—and I haven't read them all—I don't recall any one where there was a case of excluding one dealer for the purpose of eliminating competition for some other dealer.

Mr. Smith: That is the situation alleged in the Arthur case, Arthur versus Kraft Phenix Cheese.

The Court: I read that case, but I have forgotten the exact facts. On the other hand, I haven't——

Mr. Leahy: I haven't found one as narrow as you put it, purely a vertical conspiracy, Your Honor.

The Court: I haven't found one.

Mr. Leahy: The Interstate is a vertical conspiracy, but there is a horizontal conspiracy on both sides.

[63] The Court: Most of the motion picture cases are a combination of the horizontal and vertical because they always involve more than one producer.

Mr. Leahy: That's right.

Mr. Smith: It seems to me that it is not important to turn upon whether cases cited by one side or the other as

analogies fit into a pattern of vertical conspiracy or horizontal conspiracy. It seems to me that the important questions would be; What is the conspiracy? Whether it is a conspiracy of that sort, what the object of the conspiracy is. Whether that object violates the antitrust laws. Whether there is a substantial interference with interstate commerce. Whether the public interest is adversely affected. Who caused the loss the plaintiff claims. With all due respect, I don't see how it helps much in the determination of those issues to determine whether the alleged conspiracy is vertical or horizontal.

The Court: I think it does, and of course so far as the public interest being affected, there seems to be a cleavage in the cases. The Fifth Circuit cases all seem to emphasize the necessity of public interest being affected, but the motion picture cases don't. Here are two competing little neighborhood theaters, and I don't suppose it makes very much difference to the public which of the two neighborhood theaters gets the first run pictures. Most of those picture [64] cases don't seem to stress the question of public interest. The Fifth Circuit cases on the other hand do. That seems to be the circuit that particularly emphasizes it.

Mr. Smith: I think all of them implicitly require public injury. It is not significant in my opinion that in some of the cases the Courts found it unnecessary to talk about public injury. I think that in most cases the plaintiffs concede that public injury is necessary, as I am sure plaintiffs concede in this case.

The Court: Yes, but you know, I don't think you have to have actual proof of public interest being affected. It seems to me that the Court will take judicial notice of the question of whether public interest is or is not affected. For example, I drive a Chevrolet car. There are five or

six Chevrolet dealers in Washington. If I don't get as good terms from one Chevrolet dealer or as good service or as courteous service, or if I think they are charging me too much for repairs, I go to another Chevrolet service station or dealer on the next occasion. On the other hand, if there is only one Chevrolet dealer in town, of course he will sell just as many cars as a half a dozen Chevrolet dealers taken together, but I wouldn't have the same opportunity and terms, would I?

Mr. Smith: Yes, you would, because as Mr. Denit pointed out in his opening, the real competition is not between [65] two Packard dealers. The real competition is between Packard and General Motors and Ford.

Mr. Leahy: Supposing you want to buy a Packard?

Mr. Smith: Those folks know darn well, and that's what keeps those fellows awake every night, how to beat competition. You would play off Ford and Plymouth against Chevrolet, and you would get just as good a price.

The Court: I might, too, but I might be as anxious to get a Chevrolet, and I would go to two Chevrolet dealers to find out which gives me better terms, which I have done.

Mr. Smith: If you assume that the public can get some advantage in playing off one Packard dealer against another, I think you cannot deny that the public gets much greater advantage.

The Court: I want to correct my statement. I personally haven't done it, but I have known of people who have done it.

Mr. Smith: But it must be recognized that the public has a much greater advantage in the effect of competition which Packard dealers, whether one or multiple, present to their competitors of other makes, and that is what keeps

prices down, and that is what protects the public and not the competition between the Packard dealers.

[66] The Court: I am not deciding anything now. My purpose in asking you to come to the bench was entirely different. I am more convinced from what you have said, that when the evidence closes there will not be much dispute in the facts, and that I will have to rule as a matter of law whether those facts constitute a cause of action under the antitrust laws; and that being so, I think as many facts as possible should be stipulated. Some facts were stipulated in the pretrial, but I was a little disappointed that more were not, and perhaps you can increase the number of facts stipulated and not put in any cumulative evidence on the facts that you know will not be disputed. That was the only purpose of my bringing you here.

* * *

RICHARD C. WEBSTER, one of the plaintiffs herein, being first duly sworn, was examined and testified as follows:

Direct Examination [67] *By Mr. Leahy:*

Q. Mr. Webster, would you state your name for the record, please? A. Richard C. Webster.

Q. And where do you reside, Mr. Webster? A. I reside at 521 College Avenue, Salisbury, Maryland.

The Court: I think you will have to adjust your voice a little so as to speak a little louder.

The Witness: Yes, sir. 521 College Avenue, Salisbury, Maryland.

By Mr. Leahy:

Q. And how long have you lived at that address? A. We bought our home there I think two years ago in the summer.

Q. What business are you engaged in? A. I am engaged in the Somerset Seafood Company.

Q. And what is the Somerset Seafood Company? A. The Somerset Seafood Company is a subsidiary company of the Webster Motor Car Company, and it is engaged in the growing and marketing of oysters.

Q. And what was the Webster Motor Company? A. The Webster Motor Car Company is an automobile dealership formed in 1937. We always were Packard dealers until March 31, 1952.

[68] The Court: Don't let your voice go down. Will you repeat the last part of your answer?

The Witness: Yes.

The Court: Speak like Mr. Leahy is speaking.

The Witness: Yes, sir. We were engaged in the sale of Packard automobiles, parts, and service to the public in Baltimore from 1937 until 1952; until March 31, 1952, and for a short period after that we handled Nash automobiles, until the end of 1953.

By Mr. Leahy:

Q. And where was the pleace of business of the Webster Motor Car Company in Baltimore? A. 4410-20 York Road.

Q. In what part of Baltimore is York Road located? A. York Road is in the northern-central section. It is on the main highway that goes to Towson, and to the various

places in Pennsylvania, York and Hanover. It leads right into the main highway. I would say it is the north-central section of the city.

Q. And how long had you been engaged in some way in the automobile business, even before you went into your own business, the Webster Motor Car Company? A. Well, Mr. Leahy, I believe I started in selling automobiles in 1914—Reo cars and trucks, and Hudson automobiles. [69] In 1925 I started selling Packards for the Zell Motor Car Company. That is Mr. A. Stanley Zell, father of the present Sidney Zell, in the fall of 1925.

Q. Did you continue from that date down until the Webster Motor Car Company closed its doors? A. Yes, sir. I continued selling authomobiles at retail with the Zell Motor Car Company until 1937, yes, sir.

Q. In 1937 what status did you have in the sale of Packard motor cars? A. Well, in 1937 we were given a subdealership under the distributor.

Q. Would you explain to us briefly what a distributor or a distributorship is, as it includes the sale or distribution of Packard Motor cars? A. Well, the subdealer, his contract is made with the distributor. In this case it was the Zell Motor Car Company.

By the Court:

Q. Is there a difference between a dealer and a subdealer? A. Oh, yes, sir. A direct factory dealer has his contract with the Packard Motor Car Company, and the subdealer under the distributor has his contract with the middleman, with the distributor, and subject to the controls and the restrictions of that distributor.

By Mr. Leahy:

[70] Q. How long did you continue as a subdealer? A. We were appointed I believe in March of 1937, with the encouragement of our officials at the factory, Mr. McCauley and Mr. McKinney——

Mr. Denit: We object to that. It is not responsive to the question.

The Court: Objection sustained.

By Mr. Leahy:

Q. What was the year in which you opened up? A. March of 1937 we started our Webster subdealership.

Q. Subdealer? A. Yes.

Q. And that was under whom as the distributor at that time? A. That was under the Zell Motor Car Company.

Q. When was it you changed your relationship, if you did change it? A. Well, we continued on as a subdealer from that time on until the war, and then during the war we devoted our time to the servicing and the sale of Packard automobiles, which we had accumulated a little prior to the war. Then in 1944, I believe it was, Packard informed us that they were going to do away with the distributor system in that area, and that all former subdealers and all other dealers in that territory would be operating on an equal [71] footing; that no one would have an advantage and that they would all be able to buy their cars at the zone office which was to be established in the area, and would all buy them at the same price. As compared to the paying of an override to a distributor, that same override would then of course go to the factory. And we continued on as a subdealer until that year, 1944 or 1945, when I believe our first direct factory dealer contract was executed

Q. And what have you to say with reference to the difference between the dealer and the subdealer with regard to the advantage which you said Packard stated to you would be tendered to everybody alike? A. Well, as a direct factory dealer you were able to operate freely and vigorously on an equal footing. There wasn't any restriction on who you could sell and who you couldn't sell. There was the same discount to every dealer. Every dealer of course had to carry his own parts and cars and accessories, and so forth, but at least he was free to offer to the prospect any price he wanted to offer him for his used car, or any discount offer in order to get that customer's business. As a direct factory dealer you enjoyed finer [72] supervision from the factory. Factory officials called on you and helped train your men, helped train your service organization. There were of course many, many advantages to the dealer himself in being a direct factory dealer.

* * *

[74-A] Q. You were familiar, were you, with the business of the Webster Motor Car Company? A. Oh, yes, sir.

Q. When was it that you became interested at all in the seafood company that you mentioned to us? [75] A. I believe we bought the beginning of our holdings in 1945. We were going through the war years, and we thought we had an opportunity to make a good investment. We had some additional capital and we did——

The Court: Just a moment. Just confine yourself to answering questions.

The question called for a date, and you gave it.

The Witness: Yes, sir; I am sorry.

By Mr. Leahy:

Q. And where is that seafood company located? A. At Deal Island, Maryland.

Q. And where is Deal Island located? A. Deal Island is 35 miles from Salisbury.

Q. What direction? A. South? It is located on Tangier Sound.

Q. In 1945, when you say you bought the seafood company, what, if anything, was the status of the Packard Motor Car Company with regard to manufacturing automobiles for public sale? A. They were not manufacturing cars at that time, and hadn't been.

Q. Do you recall when it was that Packard ceased manufacturing cars for sale to the public? A. It was just a little after Pearl Harbor.

[76] We got the last of the line to be sold to OPA certified purchasers.

Q. When you say "we" to whom do you refer? A. Webster Motor Car Company.

* * *

Q. When was it they started manufacturing cars again? A. We didn't get any cars until 1946, and then very few.

Q. When was it that production swung into full capacity, if you know? A. Well, I would say that in 1947 the Packard produced a few more—I don't have the figures, Mr. Leahy; and gradually in 1948 they produced a few more. They were a little slower than most manufacturers in getting back in production from wartime production. But from '49 on Packard began producing I would say a normal amount of cars.

Q. How much time did you put in on the seafood company while there was a non-production of cars for sale to

the public? A. Well, in 1945 we had local management for the seafood company, and by 1946 we had lost some money in the [77] seafood business, and were told that in the best interests of our company, the Webster Motor Car Company——

The Court: Suppose you confine yourself to answering questions. You go way beyond the question.

The Witness: I am sorry.

By Mr. Leahy:

Q. How much time did you then give to your business in the seafood company? A. Well, beginning in 1946 I would say that I spent approximately 75 or 80 per cent of my time. That was about what I would judge.

Q. That is from '46? A. From '46 on.

Q. Did you have anybody to take charge of your motor car company business? A. Oh, yes.

Q. Who was that? A. Mr. Harry French.

Q. And who is Harry French? A. Mr. French had been with the Zell Motor Car Company with us, one of my brother salesmen, and went with me when I opened up my subdealership. He had been with that company all those years.

Q. And was he with you up to the time the motor car company closed? [78] A. Yes, sir, he was with us ever since the day we opened.

Q. In what capacity did he serve the Webster Motor Car Company? A. Well, in the early years Harry served sometimes as service manager and salesman, but in 1946 Mr. Braden, our zone manager here, recommended that I make Harry president of the company, in view of the fact that I was engaged then in the seafood business, and he

liked Mr. French's management of our company, and he could be in daily touch with him——

Mr. Denit: We object.

The Court: Objection sustained. You must confine yourself to just answering questions and not adding anything.

The Witness: Yes, sir.

By Mr. Leahy:

Q. Who is Mr. Braden, or who was Mr. Braden at the time? A. Mr. Braden was the zone manager of the Washington Zone. He is the one that set the zone up here.

Q. For Packard, you mean? A. For Packard, yes, sir.

Q. Just tell us very briefly what is the zone? A. Well, the Packard Zone is the official Packard headquarters that controls the various states, or the areas; [79] like the Washington Zone controls Maryland, the District of Columbia, Virginia, North Carolina, and I believe parts of West Virginia.

Q. And how many officials did Packard maintain in the Washington Zone from the time you know it? A. I didn't quite understand that.

Q. Did the Washington Zone have a Packard manager? A. Oh, yes—a zone manager.

Q. Did it have any other officials besides? A. Yes. It had a parts manager; then it had other officials like billing clerks, and accessory managers, and so forth; a city manager under the zone manager. The city manager would call on us in Baltimore, and then they had an assistant zone manager, too.

Q. With relation to the Washington Zone, what position did Braden hold? A. He was the top man. He was the zone manager, the general manager.

Q. During what years? A. Well, from the time it was opened until I believe 1951.

Q. Did he have knowledge of the fact that you were in the seafood industry? A. Oh, yes, sir, he did.

Q. Do you recall when it was that you first heard [80] anything whatsoever of Mr. Zell making any step or attempt to eliminate any of the other dealers in Baltimore? A. When I first heard of Mr. Zell's attempts to eliminate dealers, I would say that it was the Schulte Motor Company, the first direct knowledge that I had.

Q. At the time you heard about the Schulte Motor Company, how many dealers were there in Baltimore and under the Washington Zone? A. Well, there was Mr. Frank DeBaugh, and there was the Webster Motor Company; the Zell Motor Car Company; Will Scott—the Scott Motor Car Company—and a little previous to that there was the Northwestern; five of us, I believe, opened up after the war.

Q. What area as a dealer did you have a right to operate in? A. We had a right to operate in metropolitan Baltimore.

Q. What did that include? A. Well, that included I believe Baltimore County and the suburbs, the immediate suburbs of the city.

Q. Did every other dealer have a right also to operate in the same area? A. Yes, sir.

Q. Was there any competition between you dealers in the sale of Packard cars in those days when the dealers were as you have just stated? [81] A. There was plenty of competition, sir.

Q. Was there any competition between you and Zell? A. Plenty of competition between all of us. We were all out to get the customer's business.

Q. In what way did that competition manifest itself, or in what manner do you say there was competition? A. Well, in the purchase of the automobile it would manifest itself in the vast majority of cases in the used car tradein. We would have a man come to us with a used car to trade in, and of course we would appraise the car and give him a price on it. Then he would tell us, Well, I can get a little bit better deal from Will Scott, or from Frank DeBaugh, and we would go in a huddle and see if we could allow more. And then we would give him what we thought was our maximum price. Then he would take that price and go to another dealer and he would say, Here, Webster has allowed us so much money for this car. I will do business with you if you will give me so much. That was the way competition worked.

Q. Was that frequent or otherwise? A. That was very frequent, sir. I would say that has always been true since we were direct factory dealers.

Q. Were you also in competition in any other department [82] of business in the selling of Packard automobiles? A. Well, we all vied vigorously for service and parts. We advertised; we had mailing lists, and we tried in every way we could to build up our parts and service business. They were the three principal things.

Q. How did that competition affect the public? A. Well, the public, they got all the benefits. Under this system the purchaser of the automobile can get the maximum value for his money.

Q. Did Packard, as the manufacturer, in any way make any attempt to control or regulate your sale of parts or your price for service? A. No, sir. They encouraged—Packard encouraged during those years this free and vigorous competition between each other. They encouraged it.

Q. When you mentioned "these years" to what years do you refer, when you were a dealer or a subdealer? A. Oh, no, only as a direct dealer—'46, or '45 until 1952.

* * *

[83] Q. What control, if any, to your knowledge, does a distributor have with relation to the sale of automobiles, or of parts, or of giving service?

Mr. Denit: We object to that as incompetent, irrelevant, and immaterial.

The Court: Objection overruled.

The Witness: May I answer?

The Court: Yes, you may answer.

A. The distributor—that is, I speak only of our experience under the Zell distributorship, because that is the only way I can——

By Mr. Leahy:

Q. That is the actual experience that you know from personal knowledge? A. Yes, sir.

Q. From your own personal knowledge, then, speak as to what control the distributor has.

Mr. Denit: If the Court please, we object to that as amplified, because it is perfectly obvious it is too remote and has nothing to do with this case.

The Court: I think this is just preliminary; that is why I overruled your objection, Mr. Denit.

Mr. Denit: We don't know how far this witness may take us, though, with these lengthy answers.

[84] The Court: I think the question is relevant as throwing a light on just what the course of competition between dealers took. I will allow the

question. I am not expressing any opinion on the objection to which you desired to get a ruling prior to trial. I don't think we have reached that point yet.

A. Under the distributor system there isn't any competition. The distributor maintains a master file. Any name in that file cannot be sold by a subdealer unless that subdealer had it in the file. The Packard owner that you sold as a subdealer could not be sold by any other dealer.

* * *

Q. Did you know the Schulte Motor Company? A. Yes. I knew Bill Schulte, yes, sir.

[85] Q. Where was his place of business with relation to Zell's? A. Well, Zell is located on Mount Royal Avenue —the sales office. His service department was on North Avenue. Now Bill Schulte's place is out in the southwest section, Edmondston Village, Edmondston Avenue, as you go in through the Edmondston Avenue highway. His service place was on Wilkins Avenue, and he had this other location at Edmondston Village.

* * *

[87] Q. Did you know Marshall Beck? A. Oh, yes, sir; I knew Marshall very well.

Q. How long had you known him? A. From the time he had come to the Washington Zone.

Q. Do you remember when he came to the Washington Zone? [88] A. I believe Marshall came sometime around '48 or '49.

Q. Do you know in what capacity he came to the zone? A. He was assistant to Mr. Braden, I believe, at that time.

Q. And then he moved up to take Mr. Braden's place, did he not? A. After Mr. Braden was put in charge of the zone.

Q. Did you know Mr. Denholm? A. Yes, I knew Alex Denholm. He was business manager.

Q. Did you know Mr. Porter? A. I knew Mr. Porter. He came in later years, yes.

Q. Came where? A. He came from Hudson, I believe.

Q. Did he come to Washington? A. He came to Washington, yes, sir.

Q. As an official of Packard in the Washington Zone? A. That is right. He was the city manager, I believe.

Q. Did you know Mr. Howell? A. Yes, sir. I have known Sam Howell for a great many years.

Q. Did he have any place in the Washington Zone as a Packard official? A. Mr. Howell at one time was regional manager, and then zone manager, and then I believe in late years Mr. Howell has been in charge of service.

[89] Q. Did you know Mr. Fenn? A. Leo Fenn, very slightly. I had met him maybe once or twice.

Q. Do you know with what office he was connected? A. I think he was eastern regional manager.

Q. For whom? A. For the Packard Motor Car Company.

Q. Did you know Mr. Armstrong? A. No, only by reputation.

Q. Mr. Abernethy? A. I knew Roy Abernethy, yes, sir.

Q. What position did he hold? A. He used to be one of our brother Packard salesmen in Pittsburgh. He later went with the factory, and then I think he was eastern sales manager under Clare Briggs.

Q. And who was Clare Briggs? A. He was the general sales manager.

Q. During what period? A. During the period, the critical period we are talking about, in 1951 and 1952.

Q. Do you recall what capacity Abernethy was in during that same period? A. I think Roy was assistant sales manager, if I am not mistaken, Mr. Leahy.

[90] Q. Do you recall whether you had any knowledge whatsoever that Mr. Beck or Mr. Porter or Mr. Zell or Mr. Proctor—by the way, who was Mr. Proctor? A. Dale Proctor?

Q. Yes. A. He used to be a salesman in Baltimore. He was an automobile salesman. Then he got in this Fendex business—that is undercoating—and then later on——.

Q. Did he go with Zell at any time? A. Yes.

Q. In what capacity? A. Later on he went with Zell and he is Zell's sales manager at the present time, and has been.

Q. Did you know him pretty well? A. Well, I know him fairly well, yes, sir.

Q. Do you know the present Mr. Zell pretty well? A. Oh, yes, sir. I knew him very well.

Q. Did any of these men tell you anything at any time with regard to any conferences they were holding with regard to the dealership situation in Baltimore? A. No, none.

Q. Did you know that Mr. Beck and Mr. Zell were arranging a meeting in New York on January 29th? A. No, no, sir.

Q. Did you have occasion to see Mr. Beck frequently [91] during this period '51-'52? A. No, I hadn't. I wouldn't say that I had seen Marshall Beck frequently. I had been mostly on the Eastern Shore and I don't believe I had seen Marshall for a great many months—Marshall or Mr. Porter until the day I met them at the

Wicomico Hotel in Salisbury. I don't believe I had seen them the summer before the fall.

Q. I meant to ask you, Mr. Webster, did the Packard factory, or the zone office, keep in close touch with the financial and the general condition of Webster Motor Car Company? A. Oh, yes, sir. You had to make out your ten-day reports to the Washington Zone on sales. You had to make out your thirty-day reports on their form, their Packard bookkeeping form, on your financial condition, and your resume of your business and the breakdown of every department—a tremendous breakdown of details; repair order numbers, and so forth.

Q. Did the zone or the factory also supervise in any way by visiting your place of business? A. Oh, yes, sir.

Q. How frequently or otherwise did that occur? A. Well, they frequently would come in, and if they wanted some change in the method of bookkeeping they would [92] get in touch with Mr. Graff.

Q. Who is Mr. Graff? A. He is the treasurer. He is our auditor and treasurer of our company, and has been for many years.

Q. How many other personnel were there in your company? A. Well, we had Mr. French, of course. He is our president. We had Mr. George Graff; he is our treasurer. Mr. Charley Thompson was our used car manager. Then we had Mr. DuPlaise, our parts manager. And then of course we had a great many of our very finest mechanics that have been with us ever since Webster was in business —Charley Spann; Joe Majestic; Lester Cofield; our company's chauffeur-porter, John Craig.

Q. What would you say was the total personnel in the Webster Motor Car Company? A. Including salesmen?

Q. Yes. A. I would judge we had as many as 30 or 35 people at times.

Q. And was your business always successful? A. I don't think we ever operated any year without a profit, sir.

Q. Were you successful personally as a salesmen? A. I was, sir, yes, sir. I led.

[93] Q. Did you lead in that field? A. Well, I did lead, but I wasn't any better salesman. I worked a little harder and put more time in.

The Court: Don't let your voice go down.

The Witness: Yes, sir. I took a little better care of my owners; they wouldn't leave me.

By Mr. Leahy:

Q. Whatever was the cause, did you lead the Packard salesmen throughout the United States and the world? A. Yes, from the time I started in 1937 I won every Packard master salesmen contest.

Q. You did tell us that DeBaugh was in a suburb. Where? A. Located in Towson.

Q. How far is Towson from the city of Baltimore? A. Mr. Debaugh's place was about five or six miles from our place, and we are in the 4400 block. You can get a pretty good idea by that. I would say Towson from downtown Baltimore is probably, well, nine miles. That's what I would judge, just making a guess.

* * *

[98] Q. Mr. Webster, I think the last time we met you were at the Wicomico Hotel ready to eat lunch? A. That's right.

Q. Did there come a time when Mr. Beck, together with Mr. Porter, arrived at the Wicomico? A. They arrived

about 20 minutes after 12. That would be on February 13th.

Q. Did there come a time when you went into the dining room for lunch? A. Yes, sir. I had previously arranged with the head waiter, who I knew quite well, I lived there.

The Court: You will have to speak a little louder. Try to readjust your voice.

The Witness: Yes, sir.

I had arranged with George, the head waiter. I lived at the hotel. I had arranged for a special table for [99] Marshall and Mr. Porter as my guests. We went into the dining room and ordered lunch.

By Mr. Leahy:

Q. And what occurred? A. Well, outside of the usual pleasantries about what a beautiful country it was, and the oyster beds and the oyster business, nothing was said about the automobile business. I would judge we were about halfway through the luncheon when Marshall said to me these words, as near as I can remember them verbatim: He said, "Dick, I have recently been out to the factory, and all of your old friends out there believe that the time has come for you to liquidate that business up on York Road." I said, "The Webster Motor Car Company?" He said, "Yes." He said, "Everything is at a peak, real estate and garage equipment, and everything." Well, a few weeks prior to that, or a short time prior thereto I had read in the papers where Packard had received a $400,000,000 contract, a contract for jet motors. I thought to myself——

Mr. Denit: We object to that, if the Court please.

The Court: Objection sustained. I think you will have to confine yourself to telling what was said, without going into what was in your mind.

The Witness: Oh, yes, sir.

[100] I said, "Is there anything wrong with the Webster Motor Car Company, Marshall?" "No, indeed, Dick, not a thing. You have always done a grand job." He then went on to talk about the advantages of getting out, and I was entitled to spend some time with my grandchildren. And a little later on in the conversation he said these words, which to me were the most significant thing that occurred during the luncheon: He said, "Besides, Dick, I know Mr. Zell is going to be very fair about this." Well, I didn't do much talking after that. Marshall was doing practically all the talking. I don't believe Mr. Porter had anything to say outside of the fact that I believe he told me he was born down somewhere near Salisbury, down at the Eastern Shore in Virginia.

The Court: Don't let your voice go down at the end of your sentences. Keep your voice up.

The Witness: So I didn't know what to think.

By Mr. Leahy:

Q. Is that all that was said to you at lunch that you can recall? A. That's all of the significant things that I recall, Mr. Leahy, outside, as I say, of the fact that I remember he did say, "You ought to spend some time with your grandchildren [101] anyhow."

Q. Do you recall that date? A. That was on the 13th of February, sir.

Q. Did you receive a letter at any time from Mr. Beck with regard to that particular meeting? A. I received a letter on the following Saturday marked "Personal and confidential."

Q. Do you recall what the date of that letter was, now, while we get it for you? A. I think it was the 14th. I think it was the 14th of February.

Mr. Leahy: This is the photostat of the letter of February 14th. I don't need to identify it because it is under the stipulation.

The Court: No, that's all covered by the stipulation. When you get ready to offer it——

Mr. Leahy: I offer it in evidence and let it be marked as Exhibit——

The Deputy Clerk: Nine, for identification.

* * *

[103] *By Mr. Leahy*:

Q. Mr. Webster, had you agreed with Mr. Beck and Mr. Porter at that luncheon on February 13th that, "you would begin now to effect such termination so that it would be completed at the earliest possible time"? A. This was not a single sentence of truth in that letter. It was an absolute——

Q. Will you answer the question? Did you agree to that or not? A. I did not.

Q. Did you agree to terminate your franchise at any time? A. It was never mentioned.

Q. Was it the consensus of opinion between you and all of you, Mr. Porter, Mr. Beck and yourself, that there were any existing circumstances in your Packard Dealership in Baltimore that would serve your best interests by liquidating that dealership and thereby terminating your Packard franchise? A. I did not, sir.

Q. Or did Mr. Porter and Mr. Beck at that time say that they would do "everything possible in assisting you to carry out this program"? A. That's not true, sir.

[104] Q. Other than the statement which you made with regard to Zell, when you said Mr. Beck said that, "You know, Dick, Mr. Zell will—" what was that? A. "And besides, Dick, I know Mr. Zell is going to be very fair about this."

Q. Was anything said by anyone at that luncheon to you with regard to Mr. Zell other than that? A. No. That's the only statement that was made, was that statement, and I didn't know what he meant by it.

* * *

[105] Q. Did there come a time when you replied to this letter of February 14th? A. Yes, sir.

Q. Do you recall when it was that you replied to it? A. Upon receipt of that letter I drove to Baltimore and met with my son.

The Court: No. You are asked, "When did you reply to it."

The Witness: Oh. I replied, I believe it was, [106] the 20th of February.

Mr. Leahy: Would you mark this in evidence as 10?

The Court: Are you offering it in evidence now?

Mr. Leahy: I think that's under the stipulation.

The Court: That's under the stipulation. It may be admitted.

Mr. Denit: We have an objection to raise. May we discuss it at the bench?

The Court: Yes, indeed.

* * *

[112] *By Mr. Leahy*:

Q. Did you get any answer to that? A. No, sir; never heard a word; never heard a reply.

Q. Never received to this day, have you, any reply? A. Never.

* * *

Q. Did there come a time when you called Mr. Beck? A. That's right. I called Mr. Beck on the 30th of March, it was, that I called him.

Q. Where were you when you called him? A. I was in Baltimore.

By the Court:

Q. On what date did you say that was? A. The 30th.

Q. The 30th of March, you mean? A. Yes, sir, March 30th that I made my other call.

By Mr. Leahy:

Q. Before that telephone call that you made from [113] Baltimore, had you written another letter to Mr. Beck? A. Yes, sir, on I believe about March 9th or 14th; I am not certain.

Q. I will show you this, in order to refresh your recollection on the date; just take a look (handing document to the witness). A. March 9th.

The Court: That goes under the same stipulation.

Mr. Leahy: Yes, I offer this in evidence at this time as Plaintiffs' Exhibit No. 11.

* * *

Mr. Denit: There are parts in that also to which we object if your Honor please.

The Court: You may come to the bench.

(At the bench:)

* * *

[116] Mr. Smith: There is another objection to this statement here, on the ground it is a violation of the parol evidence rule.

Mr. Denit: Judge isn't letting it in for proof of the fact; it is merely that that was his assertion at that time.

The Court: Exactly. That is not admitted as proof of the fact, but to show the course of the discussion.

* * *

[121] *By Mr. Leahy*:

Q. Mr. Webster, you spoke here in this paragraph next to the last which I just read, as follows: "I am confident that you will give proper weight to the fact that it was solely due to the advice and insistence of you and Mr. Braden that I stayed in business and reinvested heavily after the fire." Had you suffered a fire at the Webster Motor Car Company? A. Yes, sir, in November 1949 we had a five-alarm fire, and eighty per cent of our building and quarters were burned out.

Q. Who then was the zone manager in Washington? A. Mr. Samuel Braden.

Q. What place in the organization, if he held any, did Mr. Beck hold? A. He was assistant zone manager.

Q. Do you know whether either Mr. Braden or Mr. Beck or both knew anything about that fire? A. Oh, yes, sir. They both knew about it and they both came to see me right in the ruins of the fire.

Q. Did you at any time acquaint them in any manner about the fire? A. Well, I told them that we were greatly underinsured at the time, that it was a terrible catastrophe. Here we were, a going organization, with no quarters

excepting the [122] southern end of our building. And of course, being very much depressed, they could see that I was in a terrible frame of mind, they gave me great encouragement, however.

Q. When you say "they" to whom do you refer? A. Mr. Beck and Mr. Braden, who was absolutely in charge of our zone.

Q. Now, you say here that it was "due to the advice and insistence that I stayed in business". A. Well, that's right. They suggested, Sam and Marshall, that we endeavor to buy the burned out property, the walls that remained, and the real estate, to rebuild it better than it was before.

Q. Who suggested that? A. Mr. Braden, and concurred in by Marshall, and the business manager, Alec Denholm.

Q. What assistance, if any, did the Packard Motor Company at that time render to you to affect rebuilding or advise you or anything of that kind? A. Sam told me—he said, "Now, if you go ahead and rebuild and buy this property, Dick," he said, "You certainly want to keep on, continue with Packard. You have been with it all your life. We will save you the architect's fees. We will have plans drawn up for you at the factory, and give you every aid that we can possibly give you to get you back in business as quickly as possible." [123] He did tell me that, "I don't want you to put this property, if you buy it—I would rather you put it in a separate corporation, and I will have Alec go over the details with you." Alec Denholm was the business manager. So at that particular moment I didn't know whether I wanted to stay in business or not. The ruins of our business were there. All that we had built up all of our lifetime in the ruins, so to speak.

* * *

[124] Mr. Denit: We have objection to both of these exhibits, and may we come to the bench?

The Court: Come to the bench, yes.

(At the bench:)

* * *

[126] Mr. Smith: May we have the evidence limited so that it cannot be used as evidence on the merits of any [127] assurance of continuation of the dealership?

The Court: Oh, yes. I will limit it to that. I don't assume, Mr. Leahy, that you are going to argue that this is a contract not to cancel the franchise or that it created an estoppel legally binding.

Mr. Leahy: No, no.

Mr. Smith: Or that it amounted to any assurance which affected the right of Packard Motor Car Company not to renew Webster's dealership.

The Court: Frankly——

Mr. Smith: I would like to have an opportunity on that, if I may.

The Court: I shall so rule.

Mr. Smith: And may I raise one more point?

The Court: And you acquiesce in that, do you not, Mr. Leahy, that this is not to be used as a basis for any argument that there was either a contract or an estoppel preventing the cancellation?

Mr. Leahy: No, it won't go so far as either one of those two.

Mr. Smith: This is what I intended to add: Or that it has any bearing upon the right of Packard to fail to renew Webster's contract.

Mr. Leahy: But it has this right, and this is what we are going to argue strenuously, or it has this bearing: [128] Upon the reasonableness of an expectancy on the part of Mr. Webster that he would be treated as he had been in the past, not as was stated again in the opening statement that we were asking for assurances that we would be treated in a manner entirely different from all others in the United States. We were only asking for assurances that we would be treated in the same manner as all others in the United States were treated.

The Court: I suspect that the real purpose in offering this, and if so, it is a perfectly proper purpose, certainly from a moral and ethical point of view, to show that it was a mighty mean thing after encouraging a man to spend $100,000 to rebuild; and after three years take the franchise away. Isn't that the real purpose why you are showing it?

Mr. Smith: For that purpose I would say that it is entirely irrelevant.

Mr. Leahy: It is just a circumstance. In all of these conspiracy cases we have to build up circumstances.

The Court: But, Mr. Smith, in conspiracy cases, and a suit under the Antitrust Act is a conspiracy case, it is proper to show motivation. Now, if you gentlemen will just bear with me, I am going to read this whole letter before I make my ruling finally.

* * *

[130] The Court: I shall admit Plaintiffs' Exhibits 12 and 12-A subject to the limitation heretofore stated. In other words, they are not to be

considered as any proof tending to show any contract or estoppel which would bar the Packard Motor Company from cancelling the franchise.

* * *

[139] *By Mr. Leahy:*

Q. Do you recall whether or not you had any reply to the letter of March 9th, portions of which I read here, and which you wrote to Mr. Beck? A. No, no, sir, I never received any reply nor any telephone calls.

Q. Did there come a time when you ever asked him why he hadn't replied or whether he had received your letters or anything of that sort? A. I called Marshall at his apartment on March 30th.

Q. What year? A. 1952.

Q. Did you talk with him there? A. Yes, sir, I talked with him regarding our situation.

[140] Q. Keep your voice up and tell us what the conversation was. A. Well, I asked him if he had received my two letters, and he said yes, he had received both of them.

Q. Did he say what he had done with them? A. He had sent them on to the factory, and that the matter was then in the hands of the factory.

[141] *By Mr. Leahy:*

Q. Did he say what he did with them? A. He had sent them on to the factory and that the matter was then in the hands of the factory.

Q. Hands of what? A. Was in the hands of the factory; it was in the factory's hands. It was right out of his hands, he said. And I tried to appeal to him, to get his friendship, to help us get straightened out, whatever it was that was keeping us from being re-enfranchised. I tried

to appeal to him in a very personal manner and way, and during the conversation that I had with him I told him that the boys over there were doing a good job. I thought we had gotten out around 20 cars so far that month. And he said, Well, Dick, the only thing that I can tell you at this time is for you to just "keep on pumpin' water" —that's the expression he used—the matter is in the hands of the factory, and as soon as I hear from the factory I will get in touch with you.

* * *

[152] Q. Now, you were about to tell us something on April 3rd. A. On April 3rd I was at Deal Island, Maryland, at the Somerset Seafood Company.

By the Court:

Q. Where did you say you were? A. At Deal Island; that was the location of our Somerset Seafood Company. Early that afternoon Mr. Beck, Mr. Porter, and Mr. Ben Marnocha——

By Mr. Leahy:

Q. Suppose you spell that name for the reporter. A. M-a-r-n-o-c-h-a, or M-a-r-n-o-c-k; I am not positive how that is spelled—but Ben Marnocha was then the business manager of the zone office. I didn't recognize him. I hadn't seen Mr. Marnocha I don't believe over once in my life, if I had seen him once; and they came, unannounced, without any telephone call, all the way to Deal Island. They came in and shook hands with me, and we greeted them and we walked out at the piers where we had some vessels there with some baby seed oysters on them, and we looked over these seed oysters. I explained to them how the oysters were grown, and then we went upstairs to the office

and sat down, [153] and Mr. Beck very quickly came to the point on this visit. He said, Dick, I have come down today to tell you that the factory has made the decision——

Q. Go ahead, keeping your voice up, now. A. That the factory has made the decision that we expect you to go through with the liquidation of the Webster Motor Car Company. I said, My Lord, Marshall, that certainly is terrible news. I said, It is a terrible day for Packard; it is a terrible day for Packard owners, and a terrible day for the Webster Motor Car Company. I said, Is there anything we can do about it, Marshall? He said, No, Dick, there is not a thing. He said, The decision has been that on the part of the factory.

Q. I don't hear you, Mr. Witness. Will you speak up a little louder? A. I said, Is there anything at all that we can do about this? And he said, No. He said, It is a decision of the factory, Dick. I said, Well, it is a very terrible thing for us and it is a very bad thing for Packard. I said, You remember what happened in 1937 and '38, when Zell had the sole control of Packards in Baltimore. You [154] remember how the public was mulched with padded prices, with the restraints and restrictions put on Packard business; and I said, This same outfit of Zell today, to a man, is the same as they were then, namely, Sidney Zell, Englar Gilbert, the treasurer, Mr. Jack Smith, the secretary, and Joe Jannin—they are all the same, all put in charge of service. And he said, Well, Dick, none of us in the zone office here now had anything to do with that thing in '37 and '38. I said, Well, Marshall, I am terribly sorry to hear it; it is a bad deal to us. I said, We owe I guess thirty or forty thousand dollars on our buildings; we have gone through the fire, and we have built up our organization, and for many years now we have been trying to build good will, extensive advertising, loaning of

cars to all our customers, especially professional people, doctors and teachers, and then to come to the end like this, after all the years of Packard service that I have put in, it's a terrible deal. He said, Well, Dick, there is one thing I can do. I have brought with me a contract and which runs until July. Now, under your old regular Packard dealer sales agreement the factory didn't take back parts, or anything like that, but under this agreement that I have brought down—he didn't pull the agreement out of his pocket—under this agreement [155] that I have brought down, we will take back all these parts. And I think just about that time Mr. Porter interrupted and he said, Well, Dick, you remember that agreement in Salisbury. Well, all during all these shenanigans and all these deceptions and all this dishonorable dealing——

Mr. Denit: Just a moment. We object to this, if Your Honor please. It is not a statement of the conversation.

The Court: Well, objection sustained.

Mr. Leahy: Just say what you said.

The Court: Just what was said, without characterizing it, and the jury will have to draw its own inference.

The Witness: Yes, sir. I forget now where I was, now.

Mr. Leahy: You were at the point where Mr. Porter had interrupted to say——

A. (Continuing) I only got so far and he said, Now, Dick, when we were in Salisbury and made that agreement—I said, Mr. Porter, of course I don't want to hear anything more about any agreement—this was the first time my ire was aroused with any of the officials. I said, You

came to Salisbury with Marshall Beck. I said—and Marshall Beck was sitting right there—and I said, You and Marshall came down to Salisbury and Marshall [156] told me that my old friends at the factory had sent him down on a mission to adivse me to liquidate our company. I said, There was no agreement made, you know that, both of you know it. I said to him, If you had suggested or if you or Marshall had suggested that I go hang myself by a noose to that tree out there, you would come back and say I made an agreement, and that's just what you are doing in this case. I said, Don't let me hear anything more about any agreements. And with that Mr. Porter didn't say anything more. And I said to Marshall, Is this final? He said, It is definitely and absolutely final. I said, Marshall, I am not going to take it lying down. If I have any legal rights in this matter I am going to prosecute it to the bitter end. It's a bad deal, and an immoral deal, and anything that is not morally right I believe shouldn't be legally right. He said, I am awfully sorry, Dick; how about signing the agreement? And I said, No, we wouldn't sign the agreement, Marshall, not running only to July 1st; I wouldn't think of signing any agreement. We walked downstairs and around on the outside. I did try to talk to him a little more. Nothing but the cold [157] shoulder. He said, No, there is nothing can be done. That was on the 3rd day of April, and they left I judge about 2:30 in the afternoon.

Q. Did you see either of the two gentlemen again, with relation to this matter of the termination of your franchise? A. No, sir. I have never seen them again.

Q. Did you since that time receive any response to any letters that you wrote? A. Never have received a response or a telephone call or anything.

Q. Did any of them come to you or send any message to you? A. No, sir, none whatsoever.

Q. So far as you are concerned, then, that was the last thing you had anything to do with any of the officers of the Packard Motor Car Company—— A. That is correct.

Q. —with regard to the renewal of your franchise? A. That is correct, sir.

Q. Since then has your attention been brought to any of the matters and things which had transpired with Zell and those same officers who saw you? A. Oh, yes, sir. Since that time, of course, we turned our troubles over to you and Colonel Hughes.

[158] The Court: Keep your voice up.

The Witness: Yes, sir. Since that time we turned our problems over to you and Colonel Hughes; and I believe that you called for the documents concerning this case.

By Mr. Leahy:

Q. At that time was Webster Motor Car Company operating successfully, or not? A. Yes, sir, it was operating successfully. We were doing a fairly good business. It was the beginning of 1952 and it looked like we were going to have a grand year, excepting for this trouble.

Q. Excluding that trouble, had anything occurred during, oh, '49, '50 or '51, with regard to the models, which had any effect on general business in the sale of Packard motor cars? A. The 1949-50 model Packards were old models, obsolete models. Packard never changed styling. The only real difference between the 1947-48 Packards and the 1949-50 was about the serial number. They called them the inverted bathtub type, you know, with the sloping trunk. Consequently they were outdated. Most of the manufacturers were streamlining their cars, and the 1949 and the 1950 models were more difficult to merchandise

and sell than any cars Packard ever built. They weren't bad mechanically but they were away out of date [159] in styling.

Q. What about 1952? A. Well, in 1951 Packard changed the line to a very nice streamlined car, and in 1951 the price was probably a little too high. But in 1952 they even made it a little more beautiful, and I would say brought the price down to where it was competitive with other makes in 1952.

Q. And from the business standpoint, what were the prospects of the successful operation of your business at that time? A. Well, it looked like that 1952 Packard dealers, including ourselves, were going to be very successful. They had surmounted the hurdle of trading in the old '48s, '49s, and '50s, which they had sold at a high price—they had to trade them; very few other dealers would trade them—if they were going to keep the good will of their owners, and they had wiped that out, and in 1952 we felt that our decks were clear and that we had good sailing from then on.

Q. With regard to anything you did following that April 3rd meeting, did there finally come a time when definitely you received word that they had cancelled your franchise and disenfranchised you? A. I received, I believe, word from Donald on March [160] 1st that Mr. Beck had said he wasn't going to renew the franchise.

Q. We can't tell what Donald told you; don't try to say that; but let me ask you, if you can recall in your mind now a date of June 4, 1952, which signifies anything to you. A. Well, I am not sure, Mr. Leahy; I don't recall.

Q. Or the date June 11, 1952. A. I know that on June 11th they had left a contract with us on, I think, April 20th or April 22nd——

Q. Let's be definite. You say "they" had left; to whom do you refer? A. Well, Mr. Howell and Mr. Porter had come to see Mr. French on the 18th of April.

Q. Were you present? A. No, I was not present.

Q. Well, we can't tell that because you don't know personally what was said. Now, you said they left something on the 20th. "They" meaning whom? A. Mr. Howell and Mr. Porter.

Q. The same two? A. The same two.

Q. Were you there then? A. No, I was not.

Q. Did either Mr. Howell or Mr. Porter, to your [161] personal knowledge attempt to get in touch with you about that matter? A. No, sir.

Q. So whatever you know about the matter you know only from talking with Mr. French? A. Mr. French, that's right.

Q. Well, we can't tell that: Now, following that, on April 20th or 21st, whatever date you may have in your mind, had you any contact in any way up until June 4th or June 11th with any of the officers of the Packard Motor Car Company, either in the zone office or at Detroit? A. No, sir.

Q. Do you recall of having seen a letter written by Mr. Beck to the Webster Motor Car Company dated June 4th? I think it is under the stipulation. A. Yes, sir; I saw the letter.

Q. You saw the letter? A. Yes, sir.

Mr. Leahy: I offer it, if Your Honor please, as Plaintiffs' Exhibit No. 18.

The Court: It may be admitted.

* * *

[163] *By Mr. Leahy*:

Q. Did you say you received or saw that letter? A. Yes, sir.

Q. Do you recall where you saw it? A. Well, I saw it at the office of the Webster Motor Car Company. I think I turned the letter over to you, over to the firm of Hughes and Leahy.

* * *

[172] Q. I believe at the close of the session on Friday afternoon we had just been discussing the event which occurred approximately in April of 1952. I believe you told us, did you not, or if you did not will you tell us now, whether you engaged counsel to look after your interests after the visit of April 3rd of Mr. Beck and Mr. Porter and Mr. Mornocha at Deal Island? A. Yes, sir, we engaged Colonel Hughes and Mr. Leahy.

[173] *By Mr. Leahy*:

Q. Do you recall approximately the date upon which that engagement took place? A. I don't recall the date, sir. It was somewhere in the first ten days of April. I would say about probably the 5th or 6th or 7th, along there.

Mr. Leahy: If the Court please, I now wish to offer in evidence, under the stipulation, letter from William E. Leahy to Packard Motor Car Company, dated April 15, 1952.

* * *

[174] *By Mr. Leahy*:

Q. Did there come a time later in the month of June when you authorized or had knowledge of the sending of

another letter by your counsel to Mr. Marshall Beck? A. Yes, sir. I think it was——

The Court: Just answer yes or no.
The Witness: Yes, sir.

By Mr. Leahy:

Q. Do you recall approximately the date? A. June 9th or 10th or 11th.

Mr. Leahy: Under the stipulation I now offer copy of the letter of the 11th day of June, 1952, to Mr. Marshall Beck from counsel for the Webster Motor Car Company?

The Court: It may be admitted.
Mr. Leahy: May it be marked?
The Deputy Clerk: Plaintiffs' Exhibit No. 20.

* * *

[177] Mr. Leahy: I now offer in evidence, under the same stipulation, a photostat of the reply of Marshall Beck to that letter.

The Court: It may be admitted.
The Deputy Clerk: Plaintiffs' Exhibit No. 21.

* * *

[178] *By Mr. Leahy*:

Q. Do you recall ever having seen an amendment to Packard Dealer's Sales Agreement, in the office of the Webster Motor Car Company, bearing date June 2, 1949? A. No, I really don't, Mr. Leahy.

Mr. Leahy: Then I offer under the stipulation, without taking up the time of the Court or the jury

to read it, the amendment to Packard Dealer's Sales Agreement, which is identified under date June 2, 1949. Do you have that, gentlemen?

Mr. Denit: Yes.

Mr. Leahy: I offer it.

The Deputy Clerk: Plaintiff's Exhibit No. 22.

* * *

[179] *By Mr. Leahy*:

Q. Do you recall, Mr. Webster, whether at any time you saw what has now been identified as Plaintiffs' Exhibit 22 in the office of the Webster Motor Car Company, and if so, can you tell us approximately when? A. I don't believe, Mr. Leahy, that I saw this exhibit.

* * *

[180] Q. Mr. Webster, may I ask you, when did you first learn that Mr. DeBaugh's franchise had been cancelled, or that a renewal had been refused? A. I learned about it for the first time on Sunday afternoon, March 30th.

Q. Following that, at any time did you have any conversations with Mr. DeBaugh with reference to that?

The Court: Just answer yes or no.

A. Yes, sir.

By Mr. Leahy:

Q. Do you recall where those conversations took place? A. At the office of the Webster Motor Car Company.

Q. Do you remember approximately the date? A. I think it was either April 7th or April 8th; I think that was the date.

Q. 1952? A. 1952.

Q. Who was present on that occasion? A. There was Mr. Frank DeBaugh and his son Mr. Charles DeBaugh——

The Court: Keep your voice up, please. Speak as loudly as Mr. Leahy is doing.

The Witness: Yes, sir.

There was Mr. Frank DeBaugh and his son Mr. Charles DeBaugh; Mr. Harry French, our president; my son Donald [181] Webster, and myself.

* * *

[183] Q. Would you identify who the Somerset Realty Company is? A. It was a separate corporation set up for the purpose of buying and owning this property.

Q. Was any suggestion made by any officer of the Packard Motor Car Company that that method of acquiring the real estate should be pursued? A. Yes, sir.

Q. Who made that suggestion to you? A. All of the officials, Mr. Beck, Mr. Braden, and Mr. Denholm, the business manager.

Q. When you say "all the officials" are you referring to all the officials in what particular plant? A. In the Washington Zone.

* * *

[184] Q. Do you recall at any time having any conversation with any of the officials from the Detroit office with reference to a renewal of your franchise after April 1, 1952? A. No, sir.

Q. Did any one of those officials that you know communicate with you in any way, telephone, telegraph, letter, or any method whatsoever? A. No, sir.

Q. Did any of the officials from Detroit communicate with you in any way at Deal Island? A. No, sir.

Q. Were the communications which you have just related to the jury the only ones which referred in any way to the renewal of your franchise after April 1, 1952? A. I didn't quite——

Q. Was there any other communication other than you have told the jury that you had with any official of the Packard Motor Car Company with regard to the renewal of your franchise? A. No, sir.

Q. Was there any information which you received from any of the officials of the Packard Motor Company, whether Detroit or Washington office, other than what you have just [185] told us? A. No, sir.

Q. What communication, if any, did you receive from Mr. Zell? A. None.

Q. Or any of the Zell officials? A. I never received any communication from Zell officials directly. We had reports that we were——

Q. We can't tell those.

* * *

[186] Q. For instance, what position did you hold in the Webster Motor Car Company after 1950 or '51? A. I was Chairman of the Board of the Webster Motor Car Company.

Q. Who was president? [187] A. Harry L. French.

Q. Who was the president of the seafood company? A. I was the president of the seafood company.

Q. Did Mr. French hold any office in that company? A. No, sir.

Q. Who was president of the realty company? A. I think I was president of the realty company too.

Q. Did Mr. French hold any office in that? A. No, sir

Q. How was the stock held in the companies, pretty much the same? A. Well, I owned all the stock of the Webster Motor Car Company with the exception of a few shares that were in my wife's name.

Q. When you say "few," how many do you think? A. I am not positive, Mr. Leahy. I believe it was about 12 shares.

Q. Out of how many? A. Approximately a couple of hundred or a hundred. I am not sure of the capital set up, sir.

Q. Was the capital set up pretty much the same in the seafood company and the realty company? A. Well, the seafood company, all the stock was owned by the Webster Motor Car Company.

Q. And the realty company stock was held by whom? [188] A. My two sons, Doctor Richard Webster in Boston owned five. My youngest son, Donald Webster had five. And my wife, Catherine Webster had 45, and I had 45. I think that's the correct set up of the realty company.

Q. Now, there was a question I wanted to ask you with reference to the letter of June 11th which your counsel wrote to the Packard Motor Car Company, attention of Mr. Beck. Did you know that letter was being written? A. Yes, sir, I knew it. Colonel Hughes called me.

The Court: You have answered the question.

By Mr. Leahy:

Q. Did you know the contents of the letter? A. Yes, sir.

Q. How did you learn the contents of the letter? A. Colonel Hughes read them to me from the Pentagon Building, Washington.

Q. Did you authorize the sending of the letter? A. Yes, sir.

Q. And in the language which was read to you by Colonel Hughes? A. Yes, sir.

Q. You mentioned the word "assurances". What assurances did you authorize should be extended, or what assurances did you ask for? A. We felt, Mr. Leahy, that in view of all the —

> [189] The Court: No, just answer the question. What assurances did you expect or did you want?
>
> The Witness: We wanted to feel that if we signed at that late date this contract, Packard would deal with us in the same good faith they had prior to February 12, 1952.

By Mr. Leahy:

Q. Following that did you receive a letter from the Packard Company or information whatsoever to the effect that a renewal would not be made of your franchise? A. After June 11th? I really don't know.

Q. So far as you know, was the letter which was sent by your counsel the last communication between your counsel and the Packard Motor Company? A. I know they replied the same day by messenger to that letter.

Q. But beyond that, you heard nothing? A. Beyond that we heard nothing.

Q. What steps, if any, did you take in the matter of liquidating your company, the Webster Motor Car Company, or to carrying on the same? A. I believe it was a day or two later, later than this reply, the last reply from Marshall Beck, that no assurances would be given to us, that we decided then to call our employees together, formally announce to them——

Q. We can't say what you said to your employees. [190] A. Yes.

* * *

Q. Did you come to a conclusion? You said you had to come to some conclusion as to whether you would liquidate under the flag or keep your organization together for liquidation. What did you decide about it? A. We decided to try to stay in business and sell our Packard assets, parts and so forth, at retail, and to try to get another agency, which we did.

Q. What agency did you get? A. Well, we finally several months later got the Nash agency.

Q. In the meantime what efforts had you made with regard to selling the assets which you had, Packard parts, Packard cars, and so forth, at retail? A. We kept going and tried to solicit service business and to sell our cars and parts, and so forth, the same as we had in the past, with the exception, of course, that we weren't [191] authorized dealers.

Q. What advantage was that in your judgment to the Packard Motor Car Company selling at retail rather than what you said "under the flag"? A. Well, it would have been—I am confident we would have suffered a much greater loss if we had advertised our liquidation sale. By choosing the method that we did, I think we eventually lost less money than we would have if we had sold under the flag, so to speak.

Q. When you say "selling under the flag," what do you refer to, at auction? A. At auction, yes, sir.

Q. What was the result of your attempting to remain in business as a dealer for the Nash Company? A. Well, we got the Nash several months later, and due to the, I suppose, the fact that we had sold Packards over all the years it was very difficult to convert to Nash. Then I think

it was difficult also to convert our personnel, old Packard men that had been with Packard, some of them, as much as 10, 15, 20 years.

Q. What was the result in your attempt in that regard? A. Well, the result was that at the end of the following year we were forced to close our doors because we had not been successful with the Nash franchise.

The Court: The end of the following year? What [192] year?

The Witness: '53, sir.

By Mr. Leahy:

Q. Would that be December '53? A. December '53, yes, sir, we liquidated our company, closed our doors.

Q. What did you do then with the unexpired term of the lease? A. Well, of course, after we closed up we abandoned our property to the Somerset Realty Company. There was nothing else to do, and we tried then to put the property in the hands of Mr. Charles S. Steffey of the Charles H. Steffey Company, and they tried to rent the property on a six months', I believe, six months' trial period. Then at the end of the six months we turned it over to the firm of W. Burton Guy. Mr. Guy just a few months ago did get us a tenant for that property.

The Court: Did what?

The Witness: I am sorry. Mr. Guy a few months ago did find us a tenant.

The Court: Oh, he bought the property. I see.

The Witness: He found a tenant for us.

By Mr. Leahy:

Q. In other words, the property is leased now through the efforts of Mr. Guy? [193] A. Yes, sir.

Q. And to whom? A. Guilford Hudson Company is the name of the company.

Q. Is it an automobile concern? A. Automobile concern, yes, sir, Hudson dealership. Mr. Harrison is the head of it.

Q. What efforts, if any, did you make to keep the Packard Company advised as to what you were doing in that regard, to wit, trying to reduce damages as you hoped to by continuing in business rather than selling out on a fast liquidation? A. Well, I think we notified them, Mr. Leahy, I am not sure, but it seems to me that we notified them, and I believe they responded in the manner that they had no interest in——

Mr. Denit: We object to that.

The Court: Objection sustained. If you have letters you might ask to put them in evidence.

* * *

[197] *By Mr. Leahy*:

Q. With reference to closing out and liquidating the Webster Motor Car Company, may I ask you this question, Mr. Webster, and please keep your voice up. What losses, if any, did you suffer at that time?

Mr. Denit: Are you speaking about the corporation?

Mr. Leahy: Yes.

A. In the liquidation?

By Mr. Leahy:

Q. Yes. A. Well, the actual monthly losses while we had the Nash franchise; what they were I don't know offhand. Then of course we lost the amount of building im-

provements that we had made to the property in buying it and building it after the fire. In addition to that we took losses on practically everything that we sold in the way of parts and machinery and fixtures and things of that sort.

Q. Have those losses been stated by anybody at your request? A. Well, Mr. Fincham has gotten up the statement. He [198] is our CPA auditor that audits our accounts, or our books—Mr. Graf and Mr. Fincham.

Q. And who is Mr. Graf? A. Mr. Graf was our office manager and treasurer of the Webster Motor Car Company.

Q. And these losses which you suffered at that time have been shown in any statements which have been drawn up? A. Oh, yes, sir.

Q. By Mr. Fincham? A. By Mr. Fincham.

Q. And also by Mr. Graf? A. Yes, sir.

Q. Do you recall whether or not the Webster Motor Car Company was substantially in the black every year of its operation from the time it took on a dealership franchise? A. Yes, sir. I am positive that we operated in the black each year we were in business.

Q. Now, have you instructed that any accounts should be stated by anybody of the years that you were in operation as a dealer, a direct dealer, of the Packard Motor Car Company? A. Yes, sir. We had Mr. Fincham and Mr. Graf audit our books back for the entire period from 1946 on through to 1952, namely, six years. Three of those years were profitable; three of them, while we had a profit, they were not as profitable [199] because we had a fire and other numerous difficulties.

The Court: You are going beyond the confines of the question, Mr. Webster.

By Mr. Leahy:

Q. Are those figures all reflected in the accounts which have been prepared by Mr. Fincham? A. Yes, sir.

Q. And together with Mr. Graf? A. Yes, sir.

Q. I think you told us last week that there was a time when the models of the Packard were not suitable for public sale, and you had some difficulty, or it was reflected in some manner in the condition of your business. Do you remember what years those were? A. Yes. They were '49 and '50. That was the year that Packard kept the same model, the same style. They had a little change of a bolt here and there, but the main difficulty in marketing was that others had brought out streamlined automobiles.

The Court: You were just asked for the years, and you have given the years.

The Witness: Yes, sir.

By Mr. Leahy:

Q. How did that reflect itself in your Packard business? A. Well, it reflected itself in there being greater [200] sales resistance to these old-style cars, the '49s and '50s.

Q. In '51, was there any change in the Packard policy with regard to their cars? A. Yes. In 1951 they brought out a new streamlined design.

Q. And how was that reflected in business? A. Well, in our particular situation we naturally had to trade a lot of these old-style cars; and '47, '48, '49 and '50 being the same old styles that had definite resistance in the sale of the new car, it had definite resistance in the sale as a used car, but having sold these cars to the public, to our owners, at a high price, we were obliged, building for the long pull,

and holding our clientele, to trade these cars at much higher prices than the market would pay for them. Consequently our earnings were reduced in 1951.

Q. It is a fact, isn't it, Mr. Webster, that the franchise is a yearly contract between you and the Packard Motor Car Company? A. Yes. It is drawn in the legal terms as a yearly contract, yes, sir.

Q. What had been your experience as a dealer with Packard with regard to renewals during the past, after you had taken out a direct dealership with the Packard Company? A. What was our experience?

Q. Yes. Did you have any difficulty with renewals [201] each year? A. No, sir, none whatsoever until this particular period 1952.

Q. You mentioned the phrase that with regard to trading in these old-model Packards you were looking forward to the long pull. What did you mean by that? A. Well, naturally, Mr. Leahy, every business man is building for the future. He, over the years, builds a clientele, and in many methods and manners and means of service he holds on to that clientele and increases it. Rather, that is what we did. We tried to do that.

Q. With regard to the year 1952, what was the prospect, in your judgment, for the sales of Packard cars during that year and the succeeding years, so far as you could see? A. It looked to me, sir, that the future looked bright for Packard and for us. We had been through the serious times of our fire in '49 and '50, the rebuilding of our property. We had operated in only 20 per cent of our old building during the rebuilding process.

Mr. Denit: We object to that as not responsive. The question was, What was the future?

The Court: Yes. Suppose you confine yourself to the specific question. I suggest the reporter read the question.

[202] The Reporter (Reading):——

"With regard to the year 1952, what was the prospect, in your judgment, for the sales of Packard cars during that year and the succeeding years, so far as you could see?"

A. We believed them to be very good.

By Mr. Leahy:

Q. Had you made any plans with regard to that year, upon that judgment and opinion? A. We had executed many plans.

Q. What had you done about advertising, for instance? A. Well, we had done considerable advertising. We had loaned our customers used cars whenever their cars were in our shop for service, building for this good will. We had cleared the decks, so to speak, of the old-model cars that we had sold new, a majority of them, and we had traded them in in 1951.

Q. What had you done about buying new cars? A. Well, in 1951 we had bought a great many new cars. We had carried a lot of inventories at considerable expense in carrying them. I think in June or July we had 60 or 70 new Packards on hand.

By the Court:

[203] Q. June or July of what year? A. 1951, sir. I might say the zone office at that time had lost their storage space——

The Court: No; you have answered the question.

By Mr. Leahy:

Q. Had you done anything as recently as March 10, 1952, with regard to the purchase of cars, looking forward to business being good? A. Oh, yes. On March 10th I instructed Mr. French to buy 20 new Packards, in addition to what he had in stock. Just about that time, somewhere about the same date, we gave a six-month contract to the Baltimore Sun for a back-page advertising. We were advertising at that time, in March, for salesmen.

Mr. Leahy: I now offer in evidence, under the stipulation, an order dated March 10, 1952, signed by the Webster Motor Car Company, H. L. French, for 20 cars for the month of April.

The Deputy Clerk: Plaintiffs' Exhibit No. 27.

* * *

[204] *By Mr. Leahy:*

Q. You stated, did you, Mr. French, that the zone office had lost its warehouse? A. They had lost their storage space in the previous year, and then they wanted us to carry the inventory, as much as we could.

Q. How were these cars then supplied? A. I am speaking of their big surplus storage spaces that they had to have at times. Of course, they did maintain some storage space, but I imagine those cars may have come to us direct from the factory. I can't be sure.

By the Court:

Q. Where was the factory? [205] A. The Packard factory is in Detroit, sir. We would get them by trailer lot.

By Mr. Leahy:

Q. In other words, the source of supply of cars for delivery to you was either the storage in Washington or direct from the factory at Detroit? A. Yes, sir.

Q. And what had been your experience with regard to cars being supplied to you from Detroit? A. Well, at times we would get them on a trailer. A trailer holds four cars, and we would get trailer loads through from the factory at times, if the zone were short of cars here.

Q. These cars, when you say you ordered 20 cars on March 20th, how were those supplied to you? Were they sold to you or delivered to you as an agent for resale, or what? A. No, everything that you buy as an automobile dealer you pay for it in cash. They get their money before you get the car. They draw a sight draft on your bank or your finance company. Now, with parts, that is different. You have a 30-day account on parts, but of course it is your property the minute you order it. You are not just a selling agent, somebody just consigning something to you. That isn't done in the automobile business.

* * *

[206] Q. In your judgment, what were the prospects for continued successful business for the Webster Motor Car Company as a dealer for the Packard Motor Car Company, not only in [207] 1952 but for the years following throughout the period of your lease? A. Well, Mr. Leahy, we looked forward with optimism to the future. We had a good name in our community. We had built up a lot of good will. We had retained our clientele. We had our new building, which was much better than the building that had burned down in '49; it was better arranged. Our community in that particular location was expanding and growing. The big department stores were building out our way. Hochschild built a beautiful store about I would say six or eight blocks from our place. Hutzler's Brothers were building farther out York Road, to Towson. We had three or four immense shopping centers that had

started to be constructed at that time. I believe that our section of Baltimore was growing much faster than any other section, though Baltimore was expanding and was growing. So it looked as though, with our stronger organization, our newer building, the capital necessary to expand if we so desired, the reputation and the standing that we had built among our Packard owners, a stronger organization within ourselves, older men, more experienced men, all these factors gave us reason to be optimistic as to the outlook for 1952 and the future years.

[208] Q. What effect, if any, do you think on the question of successful operation of your business had Schulte's retirement from dealership, also DeBaugh's, have upon it?

Mr. Denit: We object to that. That is pure speculation.

The Court: Objection overruled.

The Witness: May I have the question, again?

By Mr. Leahy:

Q. What effect did Schulte's retirement from business, and DeBaugh's failure to get renewal as a dealer, have upon the Webster Motor Car Company's prospects for successful operation? A. Naturally you had less competition; naturally you would get a good many of their people in the way of service and sales, and you would enjoy that business, you would enjoy the business that they would have had if they stayed in business.

Q. In your judgment then, as a Packard auto man, Mr. Webster, over the years preceding, did you look forward to continued operation in the black, as you had been in the past? A. We certainly did, yes; sir.

Q. And what, in your judgment as such a dealer in Packards, was the prospect for continued profits annually,

smaller or greater than what you had made in the past? [209] A. Mr. Leahy, we believed, we firmly believed, that we would average at least as much from the time we had started as direct factory dealers; we started in 1946. Some of them were good years, some just fair years, but as an average we believed that in the future we would at least make that average and possibly a lot more.

Q. Are all of those profits during those years shown in the Fincham reports which you had them get ready? A. Yes, sir.

Q. They are? A. They are shown in the reports compiled by Mr. Graf and Mr. Fincham, yes, sir.

* * *

[210] *Cross Examination by Mr. Denit:*

Q. Mr. Webster, as of February 12, 1952, you were devoting very little time to the automobile business; is that correct? A. Yes. I would say, sir, that most of my time was spent at the Somerset Seafood Company.

[211] Q. How many days of the week did you spend at Baltimore at the place of business of the motor company? A. It would depend, Mr. Denit, on the season. Our oyster business is active in the State of Maryland from September the first through April. Sometimes we would close the 1st of April, sometimes the last of April. Now, during those months I spent very few days at the Webster Motor Car Company. We would drive to Baltimore. We maintained an apartment in Baltimore, and we would drive up there sometimes Friday night, sometimes on Saturday, and if we drove up on Friday, I would spend part of Saturday engaged in the going over of various things at the Webster Motor Car Company. Now, that was from 1946 on til 1952 when I was actively engaged in the Somerset business.

Q. And as the business of Somerset increased in volume you spent more time at Somerset, did you not? A. No, I didn't have a great deal to do with it, Mr. Denit. We went down there to sort of rehabilitate and investment we made in 1945. By 1946 it had lost some money.

The Court: Well, you are going outside the question. Confine yourself to the question.

The Witness: Yes, sir.

By Mr. Denit:

Q. What investment did the Webster Motor Car Company [212] have in Somerset; what amount of money? A. Well, now, that I don't know, sir. You have our records there. You could get that.

Q. I am merely asking. If you don't know, you can say so. A. I don't know. I really don't know.

Q. Was it a large amount of money? A. It varied from year to year.

Q. Well, as of 1952, can you tell the court and jury approximately how many thousand dollars Webster Motor Car Company had invested in Somerset? A. No, I can't. I really can't give you that figure, sir. Our statements will show that.

Q. Sir? A. Our statements will show that.

Q. But you can tell us? A. No, sir, I can't tell you.

Q. Isn't it a fact, Mr. Webster, that you went to Somerset Seafood Company with the idea and purpose of eventually devoting your entire time to that business? A. No, sir, that was not the purpose of my starting in active management of the business. When I first went there I hoped I could get away quickly, get back to Baltimore.

Q. But you never did that, though, did you? [213] A. No, it took a couple of years for us to get going, going good in the seafood business and building up our business like we had at Webster Motor Car Company.

Q. And eventually bought a home and made your home in the Eastern Shore; is that correct? A. Eventually we bought a home about two years ago in Salisbury.

Q. And closed your apartment in Baltimore? A. That was after 1952, though, Mr. Denit, that we bought the house in Salisbury.

Q. But eventually you did buy it and located there? A. Yes, sir, about two years ago.

Q. You stated that you approximate the amount of time devoted to the automobile business after 1949 at about 75 to 80 per cent of your time; is that correct? A. I would say so. After. I would say that that would be somewhere about correct, sir.

Q. Now, upon what records or other information did you make that estimate? A. Mr. Denit, we consulted with each other, Mr. French and Mr. Graf, our treasurer, on this particular question you are asking now.

Q. When did you do that? A. Well, that has been done over the past year.

Q. You mean since this lawsuit was filed? [214] A. Yes, since this lawsuit was filed.

Q. And the conference together was to arrange some estimate of your time; is that correct? A. To recall and refresh my recollection as to the amount of time I spent at the company, yes, sir.

Q. And you have no records of the amount of time you spent there? A. No, sir.

Q. And Mr. French has none? A. No, sir.

Q. And the Webster Motor Car Company has none? A. No; that's correct.

Q. And when you gentlemen conferred with a view to estimating the amount of time you spent in the automobile business you did that for the purpose of computing the claim to be asserted in this lawsuit, did you not? A. We knew the question of how much time—we felt the question of how much time I had spent in Baltimore would come up, and in order to be as accurate as we can possibly be, I naturally advised with Mr. Graf, my treasurer of the company, and Mr. French, my active manager, as to what they thought in the way of how much time during the summer particularly that I spent at the company.

Q. At the time this lawsuit was filed there had been no such estimate made, had there? [215] A. No, only in my mind, if you would have asked me then I could have given you as accurate or as truthful an estimate as we could.

Q. I understood you to say that you had to sit down with Graf and Mr. French? A. No, I didn't say I had to. And for the purpose of being truthful and accurate I said I have consulted my two active men at our company as to their estimate of how much time I had put in through the summers of 1946 when I first went down there, '45, on through until we closed our doors.

Q. Now, you told us, Mr. Webster, that you were devoted to the automobile business and particularly to the sale of Packard automobiles; is that correct? A. Packard knows I was, sir.

Q. I didn't ask you that question. Is that correct? A. Yes, sir, I was; that's correct.

Q. Now, you have also told us that in 1951 you thought that the future for the sale of Packards was bright and in

1952 you thought it was even brighter; is that correct? A. I said in 1952 I thought the future was very bright. I think that's the statement I made.

Q. And of course you desired to remain a Packard dealer? A. We certainly did.

[216] Q. Sir? A. We certainly did.

Q. And yet when a contract was submitted to you to continue as a Packard dealer until March 31, 1953, you rejected the contract; is that correct? A. That's partially correct.

Q. What part is not correct? A. Well, the background of the actors behind the scenes. There are many acts of duplicity and treachery from February 12, until April 22, when the offer of renewal was left with Mr. French, all prior acts had been with me. But when they get notice of suit they go to Mr. French and leave this supposedly good offer.

Q. Is that what influenced you to reject the offer to renew until March 31, 1953? A. Not entirely, Mr. Denit. We didn't reject it to begin with. We tried to find some evidence that Packard would treat us in good faith, treat us as they had prior to February 12.

Q. Now, prior to February 12, 1952, Packard had given you a dealer's contract on a one year basis; is that correct? A. That's correct, sir.

Q. And that was the only kind of contract that you ever had from Packard? A. That is true.

[217] Q. And that is the kind of contract that you subsequently obtained from Nash, isn't it? A. I beg your pardon?

Q. That is the kind of contract you subsequently obtained from Nash? A. That's what I am telling you. That is what they did to us, and all the acts of bad faith that

they showed from February 12 on up until the time they left us—left that office left us in doubt.

Q. Maybe you didn't understand my question. I said isn't that the kind of contract you subsequently took from Nash when you became a Nash dealer? A. Yes, sir, that was the kind of contract we took from Nash.

Q. You didn't ask Nash to give you some assurance that that contract would be renewed from year to year indefinitely, did you? A. No, but we had good reason to have good faith in those people. They had not done anything like Packard had done.

Q. Will you answer my question? A. Yes, sir.

Q. Will you read the question?

The Court: I think the answer is responsive. It amounts to "no."

[218] Mr. Denit: Well——

The Court: "No," with an explanation. The witness has a right to explain his answer.

By Mr. Denit:

Q. Now, Mr. Webster, when you were seeking assurances from Packard did you tell them exactly what you wanted? A. No, sir, I didn't personally tell them what I wanted. Mr. Leahy told them in his letter of June 11. If you want me to give you the——

Q. I have asked you. A. To give you the whole truth of it, Mr. Denit, we hadn't ever asked Packard for anything more than our usual contract. We had invested just a year and a half before 96 or 97 thousand dollars. We didn't ask for any special contract. We had emerged from the fire. We went ahead and made these improvements on their suggestion, and set them up the way they said. But

we didn't ask for any special contract. We knew, or we had confidence in Mr. Braden and Packard, up until the 12th or 13th day of February, 1952. And we believed they would live up to it like we would live up to the contract in good faith. So therefore we didn't need any.

Q. Now, have you completed the answer? A. Yes, sir.

Q. As a matter of fact, you did not invest the $97,000 in land or buildings, did you? [219] A. We invested $96,000 in lands and buildings and fixtures and the replacement of our losses that occurred during the fire. I think that's correct. I am not exactly sure but it is either 96 or 97 thousand dollars.

Q. Wasn't it $91,000 that your company invested and in that wasn't there $24,000 represented by parts? A. It is possible, sir.

Q. Don't you know that to be true? A. No, I do not. I thought the total that we outlaid to replace the parts and the fixtures and the buildings. Of course, I don't have the figures before me but I thought it was $96,000. I may be mistaken, Mr. Denit, on that.

Q. Now, Mr. Webster, the fire occurred in 1949? A. November of '49 that's correct.

Q. And at that time you had a contract as a dealer that would expire March 31, 1950? A. Yes, sir.

Q. On or prior to March 31, 1950, you were tendered another contract as a dealer, were you not? A. Oh, yes.

Q. And that contract expired March 31, 1951, correct? A. Right, sir.

Q. And on March 31, 1951, or thereabouts, you were offered and accepted a renewal contract which terminated March 31, 1952? [220] A. That's correct.

Q. Is that correct? A. Yes, sir.

Q. Now, on the occasion of any one of those three renewals you did not demand an assurance in writing from Packard that your dealership would be continued indefinitely, did you? A. No, sir.

The Court: You have been over that. He said he didn't. He said he only did it in '52 because of what happened in February '52. Now, he has said that before.

Mr. Denit: I don't mean to be retreading.

The Court: I am trying to shorten it so as not to prolong the trial. I don't mean to be critical.

Mr. Denit: It is all right.

By Mr. Denit:

Q. On February 14, or thereabouts, you received a letter from Mr. Beck? A. No. No. I didn't. I received the letter at about the 16th, somewhere around there, yes, sir.

Q. And thereafter you had certain conversations and wrote certain letters with respect to the continuance of your dealership, correct? A. Yes, sir.

Q. And your efforts to obtain a continuation of your [221] dealership you said ceased on April 3, 1952; is that correct? A. My own personal efforts?

Q. Yes, sir. A. No, sir. We continued to try to have Packard offer us our contract back. Mr. Leahy was in touch with the company.

Q. What did you personally do? A. Well, I was at Deal Island. I did very little excepting by phone. I talked to Harry. I talked to Donald. I talked to Mr. Graf, and I talked to Mr. Leahy and Colonel Hughes.

Q. Didn't you authorize your son Donald to conduct negotiations for securing a renewal contract? A. Well, Donald was here in Washington, Mr. Denit, and he did attend a meeting on May 20th at Mr. Leahy's office representing me and our company as my son, not as my attorney, as my son.

Q. Do you know that he, at the meeting, represented that he was secretary of the Webster Motor Car Company and was speaking on its behalf as such? A. Well, yes, sir. I knew that he attended that meeting.

Q. He reported—— A. I fully authorized him.

Q. He reported the meeting to you, didn't he? [222] A. Yes, sir, he reported it to me.

Q. And he told you what transpired? A. Yes, sir.

Q. Did he tell you that he had suggested to the representatives of Packard that before the new contract would be signed by Webster it would have to be cleared by Webster's board of directors? A. Yes, I believe he did, sir. I believe I remember something of that sort.

Q. Did Webster's board of directors meet and consider a renewal contract? A. Well, Mr. Denit, I don't know whether you mean a formal meeting because we were a family-knit corporation. We didn't have a formal meeting, but we discussed the offer of the contract back to us, along with the uncertainties and the lack of belief, or the lack of confidence, I might say, that we had in the fact that they might be offering us this in good faith. We were afraid they were offering it to us as a death sentence postponed until the end of the renewal. That was the primary consideration. We were in serious doubt as to whether they had not gotten together with Zell, and in order to avoid our suit, to give us a contract, which during the life of that contract they might find some reason to cancel it for cause.

and manufacture for that reason. Those [223] are the thoughts that were in my mind.

Q. Had they ever manufactured a reason for cancelling for cause before? A. They had not up until February 12.

Q. And even on February 12, 1952, they didn't suggest a reason for cancelling for cause, did they? A. No, sir, but the things they did from February 12 on we knew that something was going on behind the scenes. We didn't know anything until the Court made you produce those documents. That is when we got the inside story of what had been done to us.

Q. You have finished answering the question, have you? A. Yes, sir.

Q. The fact is, I take it, then, there was no formal meeting of the board of directors of the Webster Motor Car Company to consider accepting the tendered contract, is that correct? A. It was an informal meeting. I will put it that way.

Q. And the only meeting that occurred was a meeting between you and your son at your home? A. Mr. French and my wife and Mr. Graf. We had meetings and conferences about it and discussions with Mr. Leahy and Colonel Hughes.

Q. Well, at the meetings, whatever they were, wherever they were held, whoever attended, did anybody present to the [224] meeting assembled the proposed agreement to extend your dealership? A. The actual contract which was given me this morning, that a——

Q. The proposed agreement to extend your dealership. A. That was in the hands of Colonel Hughes and Mr. Leahy, Mr. Denit.

Q. You mean your board was meeting to consider something that it didn't have the evidence or the agreement

before them? A. We didn't. The only significant thing that I remember in the contract was they thought so much of us they raised our quota about 50 per cent over what we had handled the year before. Maybe 100 per cent.

Q. Now that's an interesting thing, Mr. Webster. You said they raised your quota in what? A. In the number of cars that we should take.

Q. In the proposed extended contract? A. In the proposed extended contract.

Q. How many cars were you supposed to take under the extended contract? A. I think they raised us to 291.

Q. What had you been taking? A. We had been on a 175 car quota.

Q. Well, then—— [225] A. And we took during 1951, we delivered 113 cars. But in this contract that they left in our office on the 22nd of April, they raised the quota to 291, requiring additional capital, and so forth. Of course we were ready. We stood willing to put all the capital into the business that was necessary.

Q. Well, then, the raising of the quota had nothing to do with your decision not to accept the contract? A. None whatsoever, sir. None whatsoever. It was only our fear, as I have expressed it to you, that they were giving us this offer because we had entered—notified them that we were going to enter suit against them.

[226] Q. You mean you were afraid to take a contract under which you thought you would make a substantial profit because you feared that they would do something to you? A. Why, surely. They could give me a contract and not give me any automobiles; they could not give me any parts.

Q. And by the same token you could have taken a contract and walked out the next day, couldn't you? A. But I never did that.

Q. That isn't the point. You could have done it, couldn't you? A. I don't know what the formal notification of cancellation is, whether it is 30 days or not. I don't know that you could do it the next day.

Q. You knew you could discontinue the sale of Packard automobiles any time you pleased, didn't you? A. I never thought of it, but I rather supposed that anyone signing a contract could in bad faith or for any reason maybe stop the business, or anything else.

Q. Then is this a fact, that Packard was willing to take a chance on your good faith but you weren't willing to take a chance on Packard's good faith? A. Mr. Denit, I tried to make it as plain as I could——

> The Court: Just a minute. I think you have exhausted that line of inquiry. You have asked the same question [227] in different forms, Mr. Denit, and the present question is an argumentative one.

By Mr. Denit:

Q. Mr. Webster, did you at any time ever write a letter to Packard stating the assurances that you wanted? A. Did I ever write a letter stating the assurances I wanted?

Q. Yes. A. No, sir.

Q. Do you know whether your son Donald ever did or not? A. No, sir, I don't think so. I am not sure, but I don't think so.

Q. While you were negotiating for a contract which you said you desired, you were also arranging to build up a case against Packard for a violation of the antitrust law, weren't you? A. I do not understand your inference there. I don't get the question, Mr. Denit.

Q. Well, let me ask you: On April 7, 1952, you went with your son to see Mr. Frank DeBaugh, didn't you ? A. Mr. DeBaugh came to see me—Mr. DeBaugh came to see us.

Q. He came to see you? A. On April 7, 1952.

Q. At your invitation? [228] A. At our invitation, that's right, sir.

Q. All right. A. That is correct.

Q. And you sat down with Mr. DeBaugh? A. That is correct.

Q. And you undertook to have him purchase a Packard automobile from the Zell Automobile Company? A. I am thankful we did, sir.

Q. And you furnished him the money with which to make the purchase? A. At no interest.

Q. Sir? A. At no interest, that's right.

Q. But for the purpose of building up a chain in evidence that you expected to use against Packard in the lawsuit, is that right? A. We knew that they would deny that they ever had any contact.

Q. I didn't ask you that question. A. What was the question?

The Court: You may read the question.

The Reporter (Reading):—

"Question: But for the purpose of building up a chain in evidence that you expected to use against Packard in the lawsuit, is that right?"

[229] A. Well, you might say that is correct.

By Mr. Demit:

Q. As a matter of fact, didn't you tell Mr. DeBaugh that you were arranging to file a lawsuit against Packard?

A. We did tell Mr. DeBaugh. We did actually tell him, Mr. Denit.

Q. And didn't you tell Mr. DeBaugh the names of your attorneys and suggest that he confer with them if he wanted to? A. Yes, sir, or counsel of his own choosing.

Q. And didn't you ask Mr. DeBaugh to join with you in this lawsuit? A. No, we did not. We told him we thought that he had a good cause of action, and unless he had some documents it was his word against theirs. And we would like for him to go down to Zell's, buy a car at the $161 overcharge over what he paid the zone the week before, and if he didn't have the money we would let him have the money, without interest, which we did. That is true. We did that, sir.

Q. Now, you did something more than that, didn't you? Didn't you ask him to preserve carefully the papers in the transaction so that you might have them? A. That's right.

[230] Q. And didn't you have the check photostated? A. Yes, sir. I am glad we did.

Q. Then on April 20th, when you had some further negotiations for obtaining a renewal of your contract, did you tell anybody connected with the Packard organization that you had been in to see DeBaugh and put through this transaction? A. No, sir, not me.

Q. Did your son? A. You would have to ask him, sir. I don't know.

Q. Did he in your presence tell anybody? A. No, sir.

Q. As a matter of fact you have never told anybody connected with Packard that there had been any such transaction, did you? A. Any such transaction as what?

Q. As the DeBaugh transaction. A. No. We just found out about it accidentally, and later Mr. DeBaugh

told us what had been done to him. He told us the full details on the 7th day of April.

Q. You referred to a $161 overcharge. What did you mean by that? A. Well, DeBaugh had been a free and direct dealer up until that time. Through the zone man Mr. Porter and Mr. Howell had [231] made his arrangements with Zell to become what I call a subdealer. The price that he paid Mr. Zell for that car, the Zell Motor Car Company, was $161 more than the same car had been purchased from the zone the week before, and Mr. DeBaugh had his bills there. In addition to that he had to Fendex it, take the Fendexing, that is the undercoating and the Simonizing, for which I believe there was an additional charge; all those things he had to take with the car if he got one. So I believe the bill will show he paid $161 more for it under the status of a subdealer than he did the week before in his status as a direct factory dealer.

Q. Do you as a Packard dealer know of anything legally wrong about that? A. I know that he has got to charge the public $161 more than the man he sells it to if he is going to do the same as he did before.

Q. Now, is that true? A. Of course that is true. If he has to pay $161 more for his article than what he did the week before, he has got to pass that $161 on to someone, or else go out of business, or else make less money.

Q. Now, let's see if that is so. Let's assume that the car that you furnished the [232] money to DeBaugh to buy, had a list price of $2,500. What would the dealer's percentage profit be? A. If they had a factory list price of $2,500 the direct factory dealer's discount I believe was around 23 or 24 per cent.

Q. Let's say 25 per cent. A. That would be one-fourth of $2,500; the list price would be $625 off of $2,500—I

mean the net cost plus transportation, federal excise taxes, and so forth.

Q. Now, DeBaugh could offer that car for sale at any price he pleased, couldn't he? A. No, sir, he could not. He had to follow the factory suggested retail price.

Q. That would be $2,500? A. $2,500.

Q. So that if any member of the public bought that car from DeBaugh he paid $2,500? A. Yes—no, he wouldn't pay $2,500, because he has got a car to trade in; he will get a discount off.

[233] Q. Let's assume that he is not trading in any car. A. Yes, sir.

Q. And the dealer is selling to a person for cash on terms. A. Yes, sir.

Q. And there is no trade-in involved? A. Yes, sir.

Q. The amount of money that the purchaser would pay to DeBaugh for that automobile would be $2,500? A. That's not true, sir. No, sir, that's not correct.

Q. What would it be? A. Well, it would be $2,500 less whatever price off Mr. DeBaugh would make that customer, which is the custom of day and time, and has been for many years. If you don't have a car to trade, you get a discount off the price. It is question of how much one dealer will give you off on that car as against the other dealer. That is competition.

The Court: You mean that a customer who pays all cash gets a discount?

The Witness: Oh, yes, sir. Especially in the makes that are a little more difficult to sell. I don't know that he is doing that on Cadillac, whether they give any, but they are probably the only ones that don't.

By Mr. Denit:—

Q. Now, the customer who pays all cash—— [234] A. Yes, sir.

Q. —assuming that the price of the car is $2,500, would pay all cash, less whatever discount Zell was willing to make him? A. That's correct.

Q. Or less any discount that DeBaugh was willing to make him, if any? A. That's correct.

Q. So that the customer didn't pay any more for the car than DeBaugh bought from Zell, did he? A. Well, he would have to, if that $161 was to be made up, Mr. Denit.

Q. Oh, in other words, if DeBaugh wanted to get back his $161, he would give a lesser discount, is that correct? A. That's correct, sure, certainly.

Q. The ultimate purchaser wouldn't pay any more for the automobile? A. That's beyond my reason. If DeBaugh—if you take $161 off the discount he is giving off the price, say that the purchaser in 1952 or '51 would go to one place and get $250 off the price of the car, instead of the car costing him, say, $2,500 delivered, he would get it for $2,250. That customer then might go to DeBaugh or Webster and say, "I can get $250. How much will you give me off? I don't have any car to trade." [235] Well, you would figure your discount. You have, say, $625. $250? "How about us giving you $350?" He might end up and say, "Well, Mr. French, Mr. Webster, if you will allow me $400, I will buy your car right now." You still had $225 left. Many, many deals are made that way, especially when there is no car to trade.

Q. Do you know what kind of a deal DeBaugh made with the car that you enabled him to buy? A. No, I do not, sir.

Q. So what you are saying here is speculation of what DeBaugh might have done? A. I know that's the way business is done. I know that's the way it is deducted, sir. That's all I can tell you.

* * *

Q. Did you ever make any complaint of Schulte? A. Yes, sir, I complained to—about Schulte's advertising. I made a complaint about that particularly.

Q. Is that all you complained about? A. Yes, sir. I believe that's all I ever complained about Schulte was his method of advertising, type of ads that we thought——

[236] Mr. Denit: May this be marked Defendants' Exhibit No. 1 for identification?

The Deputy Clerk: Defendants' Exhibit No. 1.

* * *

[242] *By Mr. Denit*:

Q. Now, Mr. Webster, you have told us that members of your family owned the stock of the Somerset Realty Company, which acquired title to the land that was subsequently rented to the Webster Motor Car Company? [243] A. Yes, sir.

Q. And the lease which has been offered in evidence is a lease which the Webster Motor Car Company signed with Somerset Realty Company? A. I suppose it is, sir. I am not 100 per cent sure of the legal details of it, but I suppose that is the lease.

The Court: Well, the lease speaks for itself. It is a lease between the Somerset Realty Company and the Webster Motor Car Company?

The Witness: Yes, sir.

The Court: I don't think you have to go further than that, Mr. Denit.

By Mr. Denit:

Q. Did you realize that under the terms of this lease, Plaintiffs' Exhibit No. 23, Webster Motor Car Company had a term for eleven years, with the privilege of renewal for an additional five years? A. Yes, sir, I knew about it.

Q. And the rent provided by this lease was $300 per month, was it not? A. That amount I believe is correct, $300 per month, yes, sir.

Q. Do you know what the reasonable rental value of that property was on December 31, 1953? A. 1953?

[244] Q. Yes, sir. A. That was when we closed up?

Q. Yes, sir. A. I would say that—we are renting it now for $600. We were trying to get $650, I believe.

Q. And that was the reasonable rental value, in your opinion, in 1953? A. Anywhere from $550 to $650, yes, sir.

Q. Since it has been re-rented it has been continuously occupied, has it not? A. For the last four months, the first rent we have got, yes, sir.

Q. And the rent received is $600 per month. A. That is correct, less the brokerage.

Q. Did the Webster Motor Car Company undertake to rent that property? A. Did the Webster Motor Car Company?

Q. Yes, sir. A. We turned it over to Mr. Esom of the Charles F. Steffey Company to rent it for us, when we closed our doors in December, 1953. But six months after that we turned it over to W. Burton Guy, and a few months ago he did get us a tenant.

Q. Didn't the Webster Motor Car Company undertake to sublet the property? [245] A. To sublet the property?

Q. Yes. A. No, sir, I don't think so.

Q. Do you know why? A. No, I don't.

Q. Instead of trying to subrent the property, Webster Motor Car Company abandoned the lease in favor of Somerset Realty Company, didn't it? A. Well, you are getting me in a field, Mr. Denit—I don't mean to offend you, sir, but you are getting me in a field that I am not so familiar with. That is a legal thing and I just can't answer you.

Q. Did the Webster Motor Car Company ever assign this lease to anybody? A. No, sir, I don't think so.

Q. Isn't it a fact that on December 31, 1953, Webster Motor Car Company surrendered possession of the property to the Somerset Realty Company? A. Yes, sir, I believe that is correct.

Q. And thereafter Somerset Realty Company offered the property for rent as its property? A. Yes.

Q. And Webster Motor Car Company didn't undertake to get anything for the unexpired term that it had, and the privilege of renewal, did it? [246] A. I didn't quite get that question.

Q. Webster Motor Car Company didn't offer this unexpired lease to anybody for sale, did it? A. I don't think so, sir. I think that the property was offered by Charles F. Steffey Company and W. Burton Guy, on behalf of Somerset Realty Company; so therefore it wouldn't have been the Webster Motor Car Company. That is the only way I know how to answer the question.

Q. Did you, as chairman of the board of directors of Webster Motor Car Company, undertake to get an appraisal of the value of that lease? A. No, I did not, sir.

Q. Did Somerset Realty Company direct you to undertake to get such an appraisal? A. To get an appraisal of the value of our lease?

Q. Yes. A. No, sir, I don't think so.

Q. Now, this lease between Webster Motor Car Company and Somerset was abandoned to Somerset after this lawsuit was filed, was it not? A. After we closed our doors. We closed our doors and our employees went to other places and we were out of business.

Q. And in addition to the lease, Webster Motor Car [247] Company abandoned to Somerset some personal property that was on the property, did it not? A. A very little bit; there wasn't much.

Q. Well, little or big, there was something, wasn't there? A. No, that wasn't abandoned. I think it was charged in to Somerset Realty Company, if I remember correctly now; I think it was charged in at the value we had, on those fixtures and furniture, at whatever was on our books. I think that is the way that was done.

Q. What would that amount be? A. You would have to ask Mr. Graf or Mr. Fincham on that. They were the ones who had the working out of this transaction that you are dwelling on at the present time.

Q. Do you know whether these items of personal property were ever formally transferred by bill of sale to Somerset Realty? A. No, I don't, sir. I wouldn't know that.

Q. Do you know whether these items of personal property were appraised by anybody? A. No, I wouldn't know that.

Q. Did you, as chairman of the board of Webster, undertake to fix the value on it? A. No, sir.

Q. Did French? [248] A. The value that we fixed on them was what they were on our books for.

Q. Those items of personal property, thus abandoned or transferred to Somerset, were subsequently rented by Somerset, were they not? A. Subsequently rented? I don't know what items you are talking about. What items

are you talking about, Mr. Denit? You are asking me to give you the whole truth to a tricky question.

Q. To what kind of a question, sir? A. Tricky.

Mr. Denit: I move to strike that out.

The Court: Motion granted. I think you should confine yourself to answering questions, and if you are unable to answer, just say so.

The Witness: Yes, sir.

By Mr. Denit:

Q. Was there not an inventory of tools and equipment either abandoned to Somerset or delivered to Somerset, or left to remain in the premises? A. They were left to remain in the premises.

Q. And was not that equipment subsequently included in the lease between Somerset and the Guilford-Hudson, Inc.? A. Yes, sir.

Q. And that is the tenant that pays $600 a month for [249] the premises and the equipment? A. Yes, sir, that's right.

Q. And the lease to Guilford-Hudson was made in November, 1954? A. Effective I believe in December, yes, sir.

Q. Prior to the lease by Somerset of this property that Webster Motor Car Company had been occupying, you made a lease to the Frame-Rite Auto Service, did you not? A. Well, W. Burton Guy did take a deposit on this from this particular company and later returned the deposit to them.

Q. And the lease you made was in the name of Richard C. Webster, was it not? A. I remember that did occur, sir, and I notified Mr. Guy himself that that was wrong; that any future lease he would draw should be drawn in the name

of the Somerset Realty Company, the owner of the property, and not Richard C. Webster.

Q. Was the fact that Richard C. Webster had leased the property individually ever recorded among the records of Webster Motor Car Company or Somerset Realty Company? A. I wouldn't know that, Mr. Denit. Mr. Graf can give you that information, and Mr. Fincham.

Q. The rent charged in the lease to Frame-Rite Auto Service was also $600 a month, was it not? A. I am not sure; I am not positive about that. You [250] have it, whatever it was there.

Q. Was there any formal action taken by the board of directors of Somerset Realty Company with respect to terminating the lease with Webster Motor Car Company? A. Was there any formal meeting of the board?

Q. Yes, sir. A. No, sir.

Q. Any record on the books to show the action taken by either corporation with respect to this unexpired lease? A. I don't think so, but Mr. Graf would have to tell you that. He has charge of all those sort of transactions for us.

Q. Mr. Webster, you stated that you had considerable apprehension about being a dealer under Zell and having any business transactions with Zell. Is that correct? A. I didn't quite get that question.

The Court: Suppose you repeat your question.

By Mr. Denit:

Q. You stated on direct examination that you had considerable fear about having any dealings with Zell, or being a subdealer under Zell. A. Well, I don't recall that I did say that.

The Court: The question is whether you did say it.

The Witness: No, sir, I don't think so.

By Mr. Denit:

[251] Q. Did you have any apprehension about being a subdealer under Zell? A. I was a subdealer under Zell in 1937 and '38 and '39 and '40.

Q. I am talking about 1952. A. Did I have any fear of being a subdealer under Zell?

Q. Yes. A. Well, I certainly didn't prefer that to being a direct factory dealer.

Q. As a matter of fact, didn't you send your son to see Mr. Zell with a view to establishing a Cadillac agency together? A. We had heard Mr. Zell was going to take the Cadillac agency and going out of the Packard business. I recall that I did call Sidney Zell and ask him to meet with Donald; I wanted to verify whether he was actually going out. It was generally reported all around Baltimore. We wanted to be in position to expand, to take up the slack if he were going out, so for that reason and that reason only I sent Donald down to see Mr. Sidney Zell.

Q. You didn't send him down with a view to being associated with Sidney Zell in a Cadillac agency to be acquired, is that true? A. No, sir, I did not.

Q. Did your son tell you he had told Mr. Zell that he [252] came down to see whether you and he could take the Cadillac agency together? A. Donald did tell me I believe that during the conversation he had with Sidney Zell that Sidney Zell said he had tried to get Cadillac, but he couldn't. But Donald told me that he then said to Sidney, Well, how about if we both tried to get it? And Sidney said Fine, why don't you try? Well, we never tried because we weren't out for any Cadillac agency, not at that time.

Q. When Donald told you that he had said to Sidney, let's try to get it together, what did you say to Donald? A. Well, I was merely trying to feel Sidney out to see whether he was actually going out of the Packard business.

[253] Q. Did you say to him, "Donald, I authorize you to go into business with Sidney Zell"? A. No, because Donald explained to me that he wanted to go to ascertain definitely whether Sidney Zell was going out, and he put that out as a feeler.

Q. And that was all? A. That's all, That's the only reason we had of sending him down there. That was a long while ago.

* * *

[254] AFTERNOON SESSION

(At 1:30 o'clock p. m. counsel conferred with the Court, in chambers, and the following proceedings were had:)

The Court: The reason I asked you gentlemen to come in was this. Something was said at a final pretrial session about the possibility of a settlement in this case, and I rather gathered from something that was said that counsel were rather in a receptive mood. Now, of course, it doesn't make any difference to me whether a case is settled or not. When this case is out of the way I will have to start another one, and this case is a rather interesting one to try, especially as compared with some others. We don't always get such high-class lawyers—on both sides, and I mean that in all sincerity, nor do we always have such interesting questions. But it does seem to me that there would be a great advantage to both

sides to settle this litigation, when you consider the possible pitfalls that each side is up against. Now, the plaintiff of course is up against the possibility of a jury verdict in favor of the defendant, and also against the possibility of the question of law, whether the facts even if proved constitute a violation of the antitrust Act or not. [255] On the other hand, the defendants are up against the possibility of a very large verdict if they lose. I have been reading the memoranda on both sides, of course. The plaintiffs' memorandum claims that the average that they made during the years from '46 to '52 was $36,000 a year. Suppose the jury says $25,000 a year? Suppose the jury limits the recovery to the remainder of the lease, and not carry it any further than the plaintiffs' memorandum would carry it? Even so, you might have a verdict between $150,000 and $200,000. Then whatever verdict is brought in I would have to multiply by three. So there is a serious possibility of a judgment here of over half a million dollars. Of course, the jury might bring in a much smaller verdict, but they might bring in even a larger one. So it seems to me that there are serious risks on both sides here, so that it is worth while to make a fair and reasonable compromise. I was wondering whether you had made any progress in that direction, gentlemen.

Mr. Leahy: Mr. Denit and I have had one talk, but only the one. But I will be glad to sit down and do what I can with Mr. Denit.

The Court: What about you?

Mr. Smith: I would be glad to tell Your Honor [256] what the history of the negotiations for the settlement have been. A year ago last December I

proposed to palintiffs' counsel that although we felt there was no merit in the case, we nevertheless felt that the corporation should consider any reasonable settlement which would dispense with the expenses of defense, and therefore invited a proposal. They said they would consider it and make a proposal. They repeated that position several times.

The Court: You repeated that at the pre-trial, and that was what really led me to ask you gentlemen to come in, because I gathered that you were in a mood willing to negotiate.

Mr. Smith: What the corporation had in mind a year and a half ago was avoiding the very substantial expense of preparing for trial, which it now has, and its incentive to settle has been diminishing. I would like to point that when this was discussed before Your Honor recently, Your Honor suggested that Mr. Leahy find out what his client would do, and see if he could make any proposition. Instead of that, Mr. Leahy merely went over and talked to Mr. Denit and asked Mr. Denit if we would make a proposition. Now, there has been no serious negotiations of settlement, and that is because the plaintiffs have had no [257] serious interest in settlement.

The Court: Oh, I am sure they have. I have never seen a plaintiff in any case who doesn't have a serious interest in settlement. I think most plaintiffs have. In fact I honestly can say that I have never seen a plaintiff that wasn't interest in settlement.

Mr. Leahy: That is true, Your Honor.

The Court: Did you have anything in mind, Mr. Leahy?

Mr. Leahy: I hadn't anything in mind because when chatting with Mr. Denit the figure which he submitted was not anything which the plaintiff would consider.

The Court: What was the figure, if you care to mention it?

Mr. Leahy: $20,000.

The Court: I think, of course, considering the risks on both sides, this case has a better settlement value. But that was only the opening figure, I presume.

Mr. Smith: Mr. Denit did not even submit a figure.

Mr. Leahy: How do you know that? You weren't there.

Mr. Smith: Let Mr. Denit speak.

Mr. Denit: I said that was a possibility.

Mr. Leahy: You said that is what you would be authorized to state, it would be about $20,000. I took it up. I would like to settle the case just as much as anybody [258] in this world. I always have.

The Court: I don't want to push this matter beyond what is appropriate for me to do, although I have often seen settlements negotiated and resulting from a discussion in front of the Court where the parties wouldn't be quite so much at arm's length as they would be if they talked to each other. Would you care to state a figure that you have in mind?

Mr. Leahy: I would be willing to talk it over with Mr. Webster. You see, I didn't get a chance to talk to him personally.

The Court: Why don't you?

Mr. Leahy: Because of this misfortune, of course, that he went through.

The Court: Do you want to have a chance to talk to him and then have another meeting, or do you want to talk to him now?

Mr. Leahy: Supposing I do that tonight.

The Court: Yes. Suppose you do that tonight, and perhaps we can have a few words just before opening of court tomorrow, say at a quarter of 10, if you gentlemen could come in here at a quarter of 10 tomorrow. In the meantime, we will go on. I think in the meantime perhaps you gentlemen might [259] consider the possibilities amongst yourselves so as to be ready to see how far you are willing to go, because as I say, if the plaintiff prevails in this case, you run a serious risk of a very substantial judgment. Of course, the plaintiff on the other hand may be defeated. It is one of those 50-50 propositions where if you lose you lose very badly, or you might win. It is one of those things where I think it is worthwhile paying substantial insurance. That is just what I wanted to say to you gentlemen.

Mr. Leahy: I will do that.

Mr. Hughes: Thank you, Your Honor.

* * *

[260] *Cross-Examination (Resumed) by Mr. Denit:*

Q. Mr. Webster, after March 31, 1952, Webster Motor Car Company continued to purchase Packard automobiles, did it not? A. Yes, sir, I believe we did. I believe we did buy some cars.

Q. As a matter of fact, as late as April, 1952, you were buying a few cars, were you not, from Packard? A. I think

we got delivery of a car we had sold sometime previous to that time, sometime later. It was a special model, yes, sir.

Q. Did you not buy any cars in the month of June, 1952? A. Mr. Denit, I really don't know the details of what cars were bought or what time they were bought. I do know we bought cars after March 31st.

The Court: I suggest you speak a little louder, Mr. [261] Webster.

The Witness: Yes. I say I don't know the details of how many cars were bought after March 31, 1952. I do know that we did buy cars after that time. What dates they were I really wouldn't know.

By Mr. Denit:

Q. You continued to buy parts also, did you not? A. I assume we did, sir. I don't know 100 per cent sure about that.

Q. Didn't you on April 9, 1952, authorize Mr. French to buy 20 new cars? A. April 9th? Well, I am not 100 per cent certain about that either, sir.

Q. Are you certain as to how many cars were actually received after March 31, 1952? A. No, I am not.

Q. Were there as many as thirty? A. Beg pardon, sir?

Q. Were there as many as thirty? A. Well, you have me. I don't know. I would have to see our statements and our records of that time.

Q. You are not able to tell us, is that it? A. No, sir. Mr. French will be able to tell you that.

Q. And you are not able to tell us how many parts in dollar volume you bought after March 31, 1952? [262] A. No, sir.

Q. But you are prepared to admit, are you not, that Webster Motor Car Company continued to purchase Packard parts after March 31, 1952? A. Yes, sir.

Q. And are you not also prepared to admit that as late as September, 1952, Webster Motor Car Company was selling Packard automobiles and Packard parts? A. Well, we had a good stock and I expect we even sold it later than that. We were trying to liquidate, we were trying to get our money out of them, so I don't know what day the last car was sold, but I know that over the ensuing months we had tried to sell all the parts and all the cars that we could, to get our money out.

Q. So that when you told us on Friday of last week that you discontinued the Packard business as of March 31, 1952, you were incorrect, weren't you?

Mr. Leahy: I object. I don't think he so testified.

The Court: I don't recall that statement.

Mr. Denit: His exact testimony was that he was engaged in business until March 31, 1952.

The Court: What page are you quoting from, Mr. Denit?

Mr. Denit: Quoting from the transcript of the [263] testimony at pages 67 and 68.

The Court: You may proceed.

Mr. Denit: Do you have the question, Mr. Witness? I think there is a question pending.

The Court: Beg pardon?

Mr. Denit: There is a pending question.

The Court: Do you understand the question?

The Witness: No, sir, I don't.

The Court: Will you read the pending question?

The Reporter (Reading):——

"So that when you told us on Friday of last week that you discontinued the Packard business as of March 31, 1952, you were incorrect, weren't you?"

The Court: The Court sustained objection to that. The Court doesn't recall any such testimony. The testimony on pages 67 and 68 doesn't quite say that.

Mr. Denit: May I ask the witness what he testified, Your Honor?

The Court: Yes, indeed.

The Witness: I meant our contract was not renewed on March 31, 1952, and officially we didn't have any contract. We were out of the Packard business, so to speak, officially, excepting that we had our assets.

By the Court:

[264] Q. You mean you were selling the stock that you had on hand; is that it? A. Oh, yes. Over the ensuing months we sold Packard parts and Packard service and Packard accessories and Packard automobiles over the ensuing months, after the contract was not renewed, out of our stock that we had prior to March 31, 1952, and anything that we received after that.

By Mr. Denit:

Q. What did you mean when you said, We were engaged in the sale of Packard automobiles, parts, and service to the public, in Baltimore, from 1937 until 1952, until March 31, 1952, and for a short period after that we handled Nash automobiles until the end of 1953? A. I meant that we were officially Packard dealers, direct factory dealers, up until March 31, 1952.

[265] Q. And you were an official Packard salesman between March 31, 1952 and the time you sold out your stock? A. We were trying to liquidate whatever we had of Packard, yes, sir, trying to do business.

Q. Mr. Webster, from 1946 to 1952 there was a period called or known as a "seller's market" was there not? A. Seller's market?

Q. Yes, sir. A. In 1946 cars were not too plentiful, and the——

The Court: I suggest you answer the question.

The Witness: Yes, sir. There was—it depends upon the interpretation of a "seller's market." What do you mean by that, sir?

By Mr. Denit:

Q. I am going to ask you that question. In the automobile trade what is meant by a "seller's market"? A. If you mean that the supply exceeded the demand, no. During those early years, the demand exceeded the supply. Then later when the factories got caught up with the shortage of cars, I think that the term used in the automobile trade was "buyer's market" beginning about 1949 or '50.

Q. Then from 1946 until, say, about the middle of 1949, the fact is that cars were hard to get, weren't they? A. Well, there weren't too many cars. You couldn't [266] get all that you could sell at that time.

Q. Isn't it a fact that your company only got 46 new cars in 1946? A. I believe that's correct. I don't know the exact amount, but I know we only got a few cars in 1946.

Q. Isn't it a fact that your company only got 54 cars in 1947? A. I believe that's correct.

Q. In a seller's market the price is higher dictated by the seller, isn't it? A. No, the price remains the factory list price. Always we operated on a suggested retail delivered price, so that the price of the car was the same on all years. It was a factory suggested retail delivered price.

Q. I suppose that would be true, too, of the allowance you made on the trade-in? A. You mean in the way of dictated allowance by the factory?

Q. Yes. A. They didn't dictate any allowance.

Q. How about the dealer? A. The dealer of course in those years of scarcity didn't have to, nor did he give away his profit on the few cars he got.

Q. As a matter of fact, in 1946 your company made [267] $33,886 on used cars, didn't it? A. On used cars?

Q. Yes, sir. A. We bought during 1946, '47, '48, we bought a great many used cars. We advertised daily for used cars, in addition to our regular Packard trade-in.

Q. I am asking you something about 1946. A. '46, we bought a lot of used cars. That's true, sir.

Q. And your profit on 107 used cars in 1946 was $33,868, wasn't it? A. I can't verify that. I don't have my statements here. I would say that we made a good profit on our used car business during those years.

Q. And on '47 cars, new cars that you bought and sold, your profit was $26,161, wasn't it? A. Mr. Denit, are you speaking of net profit or gross profit?

Q. Gross profit. A. That's possible. I couldn't figure the discount on 47 new cars. That would be 26 to 47, would be about $500 gross per car. I assume that's correct.

Q. $556. A. I would say that's correct, yes, sir.

Q. In 1947 isn't it a fact that you bought and sold [268] 54 new cars with a gross profit of $45,539? A. I am not sure about those figures, but I assume that they are correct if you are reading from my statement.

Q. That would be approximately $843 per car, wouldn't it, gross? A. That's right. That's gross profit.

Q. And in 1947 you sold 115 used cars for which you had a gross profit of $27,055? A. I assume that would be correct, sir.

Q. Aren't those two years abnormal years? A. Well, they were abnormal in the sense of the shortage of new automobiles, but with us we made it up by going out and buying a great many used cars, that is the Webster Motor Car Company, which we merchandized during those shortages.

Q. In the period between 1946 and 1952, weren't the profits earned by the Webster Motor Car Company larger during the period of the seller's market? A. Yes, sir, during the period of what you call the seller's market they were larger, yes, sir.

Q. Now, then, at the end of the first half of 1949 we reached what was known as a buyer's market, did there not? A. I think along there we began to get as many or more cars than we wanted, that's right.

Q. To your company as a dealer that meant that you [269] had to do either one or both of two things, didn't it, increase the discount on a cash transaction or increase the allowance on a trade-in? A. I don't quite understand that, Mr. Denit.

Q. When you were confronted with a buyer's market, didn't it mean that you as a dealer were compelled to do either one or both of two things, increase the discount on a cash transaction or increase the allowance on a trade-in, or increase both of them? A. We did increase our allowances during that time, but we did many other things. We reduced overhead, probably. We went out for more service. We tried to make up in various other phases of the automobile business enough profits to assure the company their overhead and a profit over and above that.

Q. During 1950 and 1951, are you able to tell the ladies and gentlemen of the jury what the gross profit of Webster was from the automobile business? A. '50 and '51?

Q. Yes. A. No, sir, I don't. I don't have those figures in my mind.

Q. It was considerably less than it was in 1948, wasn't it? A. Yes, sir.

[270] Q. And considerably less than it was in 1947? A. Yes, that's correct. I am sure of that.

Q. As a matter of fact, in 1951 it was less than $5,000, wasn't it? A. I don't know. I don't think that we made less than $5,000. I may be wrong about that.

Q. Have you looked at your records prior to appearing here on the witness stand? A. I haven't seen the statements for a long while, no, sir.

Q. You haven't seen them for a long time? A. No, sir.

Q. You can't tell us then what your profit was, or approximate the profit of your company in 1951? A. I know it wasn't—I am certain that it wasn't less than $5,000. You said it was less than $5,000. I think you are wrong on that. I may be mistaken, but I don't believe I am.

* * *

[271] Q. I asked you if the Somerset Realty Company rebuilt or built a building in accordance with plans and specifications furnished by Packard? A. The only thing I can say there is, No. We changed them later on. We changed their plans.

Q. Then the fact is Somerset built in accordance with its own ideas as to what kind of a building it wanted? A. With the approval of the factory. Our plans were all approved by Mr. Braden and Mr. Beck. They were in consultation with us.

* * *

[273-B] Mr. Smith: I understood that the evidence was admitted for the purpose of indicating a probability that Webster would continue as a dealer, and the document that Mr. Denit has I believe goes directly to that question of whether there was such——

The Court: You may put that document in evidence if you want to. By the way, I don't know whether you know it [273-C] or not, Mr. Denit, I always follow a practice of allowing the defendant to put in documentary evidence during cross-examination of a plaintiff's witness. I don't adhere to that old procedure that the defendant waives his right to make a motion for a directed verdict by so doing. I construe the new rules as abolishing that limitation.

[274] Mr. Denit: Upon that instruction we would offer it in evidence. Otherwise we would not.

The Court: I know that some lawyers who were brought up prior to the new rules are still afraid to do this, and that's why I often repeat to lawyers that I construe the new rules as doing away with that form of limitation.

Mr. Leahy: We have no objection to it.

Mr. Denit: We are going to offer it.

The Court: But there is no use arguing with the witness over something that the other side doesn't claim. If defense counsel desires I am perfectly willing to state that in the presence of the jury, as to the purpose, and the only purpose for which I admitted this evidence. I didn't want to state it in the hearing of the jury unless defense counsel wanted me to.

Mr. Denit: I think it would be proper so to state it, and I think it ought to be on the understanding that both counsel request Your Honor to do it.

The Court: Is it agreeable to both counsel that the Court should state to the jury the purpose?

Mr. Leahy: I have no objection. If I had had that enclosure I would have offered it, Your Honor, but I just didn't have it.

The Court: May I see that enclosure?

[275] Mr. Denit: Yes, sir (handing document to the Court).

Mr. Smith: That went with the letter that Mr. Leahy offered in evidence.

(In open court:)

The Court: The Court wishes to inform the jury that the only purpose for which the Court admitted evidence concerning the rebuilding of the Webster plant in 1949 was as evidence tending to show that relations between Webster and Packard at that time were on a very friendly basis, and that hence it was a probability that the franchise of Webster would have been continued to be renewed from year to year if it were not for the alleged conspiracy between Zell and Packard, originated by Zell in 1952, which the plaintiff claims caused Packard to cancel Webster's franchise. Now, you may proceed.

* * *

[276]Q. Now, Mr. Webster, had your son Donald retired from the automobile business on February 14, 1952? A. I believe at that time he had gone with the Department of Justice, yes, sir.

Q. Did you tell Mr. Beck and Mr. Porter that he had gone to the Department of Justice to work as an attorney on February 7, 1952? A. Did I tell them on February 7th?

Q. No, that he had gone there on February 7, 1952. A. I can't give you the date, Mr. Denit. I know that Donald had been accepted as an employee at the Department of Justice.

Q. Prior to February 14, 1952, had Mr. French experienced a cardiac attack? A. Not in the year 1952. Harry had been taken sick in 1951, I think it was, and one physician told him it was a cardiac condition. It later developed it was a stomach condition; it wasn't a cardiac condition. So he had been sick, not incapacitated so that he couldn't work, but he had been not feeling well I think in the summer or fall of 1951.

* * *

[281] Q. Who determined the salary that you were paid by Webster Motor Car Company? A. Well, I always determined that, I suppose, Mr. Denit. I discussed it, of course, with Harry French, because he was on a profit sharing basis with us. And I would also consult with Mr. Graf, more than likely, about it. So that I primarily would be the one responsible, I suppose, for that.

Q. Did you believe that your services to the Webster Motor Car Company in 1950 were worth $15,000? A. That's a hard thing to answer, Mr. Denit. I formed our company. I spent 11 years before the company was formed. I built it up day and night. Whether when one reaches as many years of service as I reached in 1950, whether you actually earn that much money for your company, I would doubt, excepting that my name was there, and a great many people I sold 20 and 25 years before were still doing business with me. Now how to value that service for the

company, I am not able to do it. I can neither say yes nor no to the question, whether I was worth $15,000 or not; I wouldn't like to say.

Q. In 1952 you wrote a letter to Marshall G. Beck, which is in evidence as Plaintiffs' Exhibit No. 10, and you stated that, in connection with the sale of your business—[282] I am quoting from the letter:

> "My first impression is that since I could assist the purchaser in Packard sales policy, a yearly salary of at least $15,000 for no less than 10 years would be the type of agreement I should make."

Did you think in 1952 that your services to the Webster Motor Car Company were worth $15,000? A. That letter was written upon the visit of Beck and Mr. Porter at Salisbury. I didn't know what was in the offing for us.

The Court: Mr. Denit, what is the relevancy of this question?

Mr. Denit: On the question of damages. The whole schedule is predicated on that.

* * *

[285] Mr. Denit: Will you read the question?

The Reporter: (reading)

"Question: In 1952 you wrote a letter to Marshall G. Beck, which is in evidence as Plaintiffs' Exhibit No. 10, and you stated that in connection with a sale of your business—and I am quoting from the letter:

> 'My first impression is that since I could assist the purchaser in Packard sales policy, a yearly salary of at least $15,000 for no less than 10 years would be the type of agreement I should make.'

"Did you think in 1952 that your services to the Webster Motor Car Company were worth $15,000?"

A. I wasn't speaking in that letter of services to the Webster Motor Car Company. I was speaking in terms of if they were trying to buy me out that I would be worth that much.

By Mr. Denit:

Q. You didn't intend to retire from the seafood business, did you, in 1952? [286] A. Well, I didn't have any intention of retiring, Mr. Denit.

Q. And you didn't intend to devote any more time to the automobile business when somebody else was running it than when you were running it, did you? A. Well, as I tell you, that was put into the letter trying to find out what was happening to us, what was back of the visit to Salisbury, and I never stopped to figure how much the $15,000 a year meant, and the other conditions that I put in that paragraph. I put it in that letter in order to find out just what was going on behind the scenes.

Q. You mean by that, Mr. Webster, that you didn't honestly believe what you wrote in that letter? A. I didn't say I didn't honestly believe it. I said I would be worth that much at least to a prospective purchaser.

Q. That would be one of the terms of any sale that you would insist upon, is that it? A. That is what it says; that is what it reads, yes, sir.

Q. And if you made the sale upon the terms you indicated, as I understand it, you didn't intend to devote any more time to the automobile business than you had been devoting; is that correct? A. Well, I certainly didn't intend to devote full time [287] to the automobile business, no, sir.

* * *

[288] Mr. Leahy: If the Court please, I should like to read at this time the deposition taken of Marshall G. Beck on August 10, 1953.

The Court: May I have the original deposition or a copy of it.

Mr. Leahy: I will pass the original to his Honor.

The Court: Proceed.

Mr. Leahy:

"Examination by Counsel for Plaintiffs—by Mr. Leahy:

"Q. Mr. Beck, would you kindly state your full name for the record, please? A. Marshall G. Beck.

"Q. And you are the same Marshall G. Beck who is named as one of the defendants in the case in which this deposition is being taken? A. Yes.

"Q. What is your present employment, Mr. Beck? A. I'm the Washington zone manager for the Packard Motor Car Company.

[289] "Q. How long have you been engaged in that employment? A. As zone manager, Mr. Leahy?

"Q. Yes. A. Since December, 1950.

"Q. And as zone manager what are your duties, please? A. Well, I have charge of the distribution and the operation of dealerships, Packard dealerships, in Washington, District of Columbia, and part of Maryland, part of Virginia, and part of North Carolina.

"Q. What is the significance of the name zone manager? A. Well, the United States is divided up into various areas and each area is known as a zone

and each zone, to the best of my knowledge, has a manager.

"Q. How many zones are there in the United States? A. I am not positive. I believe there are about 16.

"Q. And, of course, when we are talking about the United States and zones, and zone managers, we are referring to the administration of its business by the Packard Motor Company? A. Yes.

* * *

[298] "Q. Who signed the contract of franchise for the area in which you represented the company as manager? A. I signed the individual contracts.

"Q. You signed the contracts for all franchises in the Washinton area? A. Yes.

"Q. Each year? A. Yes.

* * *

[327] "Q. So, as I understand it now, you never at any time discussed the Zell Motor Company, its business, or its dealership franchise with Mr. Spencer at all? A. I never did. Mr. Spencer was in on a conference that we had with Mr. Zell in New York in—I believe it was January or February of 1952.

* * *

[329] "Q. When you got there, who was there? A. Well, at this conference there was myself, Mr. Zell, Mr. Briggs, Mr. Abernethy, Mr. Spencer, and Mr. Fenn.

[330] "Q. Who was Mr. Fenn? A. Well, he was what they term the Eastern Divisional Sales Manager. He had the zones in the East under his supervision.

"Q. And that included, of course, your zone, the Washington Zone? A. That is correct.

"Q. Did it also include New York, Boston? A. Yes. I believe so.

"Q. Now, who was Mr. Abernethy? A. He was Mr. Briggs' assistant. He was what I believe, termed the assistant general sales manager.

"Q. Mr. Briggs was the general sales manager, was he? A. Yes.

"Q. Did that include the whole country? A. Yes.

"Q. Mr. Zell was the holder of a franchise through his corporation over in Baltimore, was he? A. Yes.

"Q. For Packard sales. Mr. Sidney Zell, is that his full name? A. That is correct.

"Q. You said that you arranged that [331] you arranged that conference? A. Yes.

"Q. At whose suggestion? A. The course of events leading up to the conference were these, Mr. Leahy: I received a telephone conversation from Mr. Zell asking me if I had any objections to his going to Detroit and seeing Mr. Briggs, and I told him positively not. And he said, 'All right, arrange such a conference for me.' I talked to Mr. Abernethy and told him that Mr. Briggs wanted to —or that Mr. Zell wanted to come to Detroit. He asked me what he wanted to come to Detroit for, and I said, 'I have no idea.' Well, he said, 'You better come with him.' So he said, 'I will contact Mr. Briggs and let you know.' I subsequently got a telephone call from Mr. Abernethy telling us that

they intended—that he and Mr. Briggs were going to be in New York at the NADA convention and that they would be very glad to arrange an appointment to see Mr. Zell and myself at that time. As a result of that, I called Mr. Zell, and he was very nonchalant about going down. He said he hadn't expected to go to New York and that they probably would be very busy. So there was nothing more done about it. And two or three days after my telephone call on the 11th of [332] January, 1952, on approximately the 11th, I received a letter from Mr. Zell telling me that on second thought he felt that he would go to New York and that I should arrange an appointment with Mr. Briggs in New York, which I did.

"Q. Where was that conference held? A. I am of the opinion, and I am reasonably certain about this, that it was at the Waldorf-Astoria, although I stayed at another hotel and I commuted back and forth, and that is why I am not positive about it.

"Q. Do you recall was it in one of the meeting rooms provided by the hotel or was it in some—— A. To my recollection, it was in Mr.—I am of the opinion that it was in Mr. Spencer's suite because he was getting dressed when we got there.

"Q. You don't know how Mr. Spencer happened to come into the conference other than you met in his room? A. No; I don't.

"Q. Do you recall what it was that Mr. Zell told you he wanted to meet Mr. Briggs for or go to Detroit to meet him? A. Mr. Zell had never discussed with me what he wanted to go to see Mr. Briggs about.

"Q. Didn't you ask him when he called you [333] to make the appointment what he wanted to

make the appointment for? A. No; I did not because I thought it was general business and I didn't figure it was any of my business if he wanted to talk to Mr. Briggs.

"Q. Well, you had had many conferences with Mr. Zell before that about dealerships in Baltimore, hadn't you? A. We had discussed it.

"Q. Didn't he say it was with reference to the dealership situation in Baltimore that he wanted to talk to Briggs? A. He did not, Mr. Leahy. I had no idea of what Mr. Zell was going to—wanted to see Mr. Briggs about. I did not know.

* * *

[334] "Q. Well, did Mr. Zell write you after he first stated on the telephone that he didn't think he wanted to go up to New York because they would be pretty busy and what not? Did he subsequently write you and say on afterthought that he believed he would go on to New York? A. That is correct.

"Q. Did he then tell you why he wanted to see him? A. He did not.

"Q. I take it you didn't ask him, from what you say? A. To the best of my knowledge, no, I didn't [335] ask him.

* * *

"Q. Wasn't it a matter of interest to you as manager of the zone to learn why one of the dealers in your zone wanted to see the general sales manager? A. It was not, Mr. Leahy. Perhaps because it is not unusual for dealers to go to Detroit. Our officials invited them up there to discuss their business.

"Q. Have you ever had one of your dealers in your zone while you were manager ask you to make an appointment with a general sales manager before or since? A. I have had dealers ask me to make appointments in Detroit for them.

* * *

[336] "Q. But your recollection is now that you as manager of this zone called and made a conference with these high officials you have named for one of your [337] dealers without anybody knowing what the dealer wanted to see him about? A. That is correct.

"Q. When did you first learn what Zell wanted to see them about? A. When Mr. Zell told them in the conference what he was there for.

* * *

[344] "Q. When did you first learn what Zell wanted to see them about? A. When Mr. Zell told them in the conference what he was there for.

"Q. What did he tell them? A. He told them that he had been losing money for three consecutive years and that it was at a time when he was going to have to let his landlord [345] know about renewing a lease, and that unless he was given an opportunity to have Baltimore as a single dealer point where he had some hopes and belief that he could put it on a profitable basis, that he was going to decide to give up the Packard dealership—not of his own choice but because, he said, he would be forced into it financially.

"Q. In other words, as I understand it, then, he told them that this lease—was that on quarters

that he occupied as your dealer in Baltimore? A. In certain of them. In part of them, Mr. Leahy.

"Q. In part of them? A. That is correct.

"Q. —was about to expire and it was necessary for him to renew the lease and incur the obligation. For how long a period did he say? A. He said something—no, I don't believe so—not to my recollection. It was a lease renewal.

"Q. For a term of years, was it ? A. I believe so.

"Q. Somewhere there is a mention made of five-year lease. Does that refresh your recollection at all as to the number of years for which that term extended? [346] A. I wouldn't know the terms of his lease No, I wouldn't. As far as I recall, it was—it may have possibly been a period of five years, but it was a term of—it was a lease renewal is what he specifically mentioned.

"Q. Do you recall how close the terminal date was at that time? A. No; I do not.

"Q. Well, did he state at that time in the conference that unless he could get that as a single dealership in Baltimore and that his company would have that single dealership that he would be compelled to surrender his dealership? A. Yes; he did.

"Q. Did he lay it down as sort of an ultimatum? A. Yes; he did.

"Q. The decision then to be made at the conference, if a decision was to be made, was to the effect whether or not at that time continuing on in the future that Zell Motor Company should be the single dealer for Packard sales in Baltimore, Baltimore metropolitan area? A. He issued an ultimatum. I don't know what his basis was.

[347] "Q. What was the general discussion then, that you recall? A. The general discussion was that the officials from Detroit would take it under advisement and that they would let him know within a reasonable length of time, they would give him their answer.

* * *

"Q. Anything said about any of the other dealers in Baltimore at the time? A. No, sir.

"Q. And at that time within the Baltimore area you had several other dealers, didn't you? A. To the best of my recollection, we had Mr. DeBaugh, Towson, and the Webster Motor Car Company on York Road.

"Q. What had happened to Schulte in the meantime? [348] A. He had given up the Packard franchise.

"Q. Under what circumstances had he given it up? A. He resigned. He asked to give it up.

"Q. Had your office, as you recall, anything to do with Schulte's surrender of the franchise? A. Other than after he requested it and we followed through on it, I believe.

* * *

[351] "Q. Isn't it true, before the time came when Schulte gave up his franchise that Schulte was attempting to sell that franchise? A. He may have been.

"Q. Didn't you know about that? A. Yes. We knew about it, and we advised him, as we do all dealers, that you can't sell a Packard [352] franchise.

"Q. That is, without the approval of the Packard Company? A. That's correct.

"Q. But you knew that Schulte was advertising in the paper, didn't you, trying to sell it as a going business? A. I had heard that he did advertise.

* * *

"Q. Well, you heard from Mr. Porter, didn't you, of the efforts of Mr. Schulte trying to dispose of the business as a going business? A. Yes.

"Q. Did Mr. Porter cooperate with Mr. Schulte in attempting to find someone to take his place? [353] A. He may have.

"Q. Didn't you know that he did? A. Well, I believe I had reports from him stating that he had.

* * *

[363] "Q. Do you know how you happened to be met at a country club? A. We called on Mr. Zell and it was approximately lunchtime and we proceeded to go to a country club for lunch.

"Q. At that time what did Mr. Zell say with regard to the Schulte area covered by his franchise? A. Well, as I recall the conversation, it was that he talked to Mr. Platfoot about the fact that he had been losing money in the Packard business and he couldn't continue indefinitely.

"Q. Well, it was pretty much the same conversation which later he expressed in New York? A. That is correct.

"Q. At that conference we have just talked about? [364] A. That is correct.

"Q. And then did he tell you that he didn't want any further dealership installed in the place of

Schulte? A. I have no distinct recollection of any specific request at that time.

"Q. Well, when was it that you concluded that you would not fill the dealership? A. I don't know that.

"Q. But there did come a time when you concluded that you would not recommend the filling of—— A. Apparently there was.

"Q. That was for the purpose of giving Zell a chance to make more money than he said he had been making in the past? A. I presume that is correct.

* * *

[381] "Q. And had you discussed with Mr. Zell his constantly operating in the red as zone manager? A. I believe that we had discussed it; yes.

"Q. And you had discussed some way, had you, of attempting to assist Mr. Zell in that condition in which he found his business? A. Only through the sale of more automobiles and parts and reducing of overhead.

* * *

[392] "Q. How long did this conference last in New York, do you recall? A. I wouldn't say over 30 minutes. Now, that is a recollection.

"Q. Now, I think you said that the way it was left was that the Detroit officials would take the matter under consideration and make a final determination; is that right? A. That is correct.

"Q. Did they make a final determination? A. They did.

"Q. When? A. On or about February 11th, I believe, Mr. Zell called me, as my recollection serves me, and asked me for the decision, and I called Detroit. And, if my recollection is correct, I talked to Mr. Abernethy. He told me to inform Zell that they would go along on the program that they discussed in New York.

[393] "Q. In other words, that they would then eliminate all of the dealers in the metropolitan area of Baltimore? A. That was my understanding.

"Q. In order to give Zell a chance to come out of the red? A. That was my understanding.

"Q. That meant elimination at that time of how many dealerships? A. I believe at that time we had three.

"Q. And those three were whom? A. Zell, Webster, and DeBaugh.

"Q. That meant to implement the program which was suggested by Zell in the conference in New York that you would eliminate DeBaugh and Webster; is that correct? A. That is correct.

"Q. Did you take steps then to eliminate either or both? A. On the 13th of—well, somewhere between the 11th and 13th we arranged a conference with Mr. Dick Webster at Salisbury, Maryland.

* * *

[396] "Q. So somewhere along the line you must [397] have put down the date February 11, 1952, and you put it in the file so that Miss Tierney got it? A. No. It wasn't in the file. The date, to be factual, I probably picked up in discussing this case with our attorneys.

"Q. When? A. We discussed the case ever since it happened.

"Q. When was the last time you discussed it? A. Saturday of this week—of this past week.

"Q. You think you got that date there from the discussion with your attorneys? A. I wouldn't say I got it that particular time. I may have got it ahead of that.

"Q. Do you recall from what kind of a document? A. No.

"Q. Did you have any independent recollection of the telephone call? A. Yes; I do.

"Q. But you didn't have the date? A. That is correct, that is correct.

"Q. That Zell called you to find out the answer to his question as to whether the authorities [398] in Detroit would eliminate the dealerships in the metropolitan area of Baltimore in order to make him or give him the chance to come from constantly operating in the red; is that right? A. That is correct.

* * *

[401] "Q. Before that conference in New York, had you ever recommended that Baltimore be a one-dealer town? A. I definitely had not.

"Q. Had Mr. Platfoot, to your knowledge? A. Not to my knowledge, Mr. Leahy.

"Q. Or had Mr. Spencer? A. Not to my knowledge.

"Q. Had you recommended to Detroit at any time prior to the conference in New York, which we have discussed, that you should eliminate any of the dealers in Baltimore? A. No, sir; I did not, to the best of my [402] knowledge.

"Q. Now, what did you do with reference to eliminating the dealerships in Baltimore after this telephone call which you had with Detroit? A. We arranged an appointment to meet Mr. Dick Webster in Salisbury, Maryland.

"Q. Had you done anything at all with reference to the other dealership in Baltimore? A. Not to my knowledge.

"Q. DeBaugh. A. Not at that time.

"Q. When did you take action on the DeBaugh—— A. Well——

"Q. —dealership? A. According to this, my notes, we wrote a letter on 3/4 to DeBaugh.

"Q. That is March 4th? A. That is correct.

"Q. 1952? A. Right.

"Q. Do you recall whether you wrote the letter yourself? A. I did not. Well, I mean it is—no, I did not. It was a letter supplied me by Detroit.

* * *

[403] "Q. Do you know who it was who supplied [404] this letter from Detroit to you? A. As I recall it, I received the letter of transmittal with it from Mr. Armstrong.

* * *

[422] "Q. Now, returning to DeBaugh, do you [423] recall whether you had any conversations with DeBaugh after the delivery of the letter dated March 4th which had been shown to you a few minutes ago? A. Yes. I recall Mr. DeBaugh coming into my office.

"Q. Did you ever chat with him at all as to what he might do with reference to the sale of

Packard cars notwithstanding the cancellation of his franchise? A. Not to my recollection.

"Q. Did anybody that you know of discuss that with him? A. I understand the city manager did.

"Q. Who is he? A. Cliff Porter.

"Q. Do you recall with reference to the date March 4th of your letter or the delivery of it March 5th when that conversation took place? A. I am informed that it took place on 4/18, the date Mr. Porter and Mr Howell contacted Mr. DeBaugh.

"Q. That is the 18th of March, 1952? A. Yes. Yes; 3/18. Apparently 3/18. I don't know. This is just some note I have here and I can be wrong. Whenever he contacted Mr. DeBaugh he discussed with him, as I understand it.

[424] "Q. You mentioned two of them having gone over. Who were the two? A. Mr. Howell.

"Q. Howell went over alone? A. No, they went together.

"Q. Porter and Howell? A. Right.

"Q. Did you get a report from them as to what they had discussed with Mr. DeBaugh? A. In regard to cars or——

"Q. Yes. A. I don't recall any report on the cars.

"Q. Anything in regard to termination or what Mr. DeBaugh might do after termination? A. Verbally Mr. Porter discussed with me whether it would be possible for Mr. DeBaugh to get cars from Sidney Zell, and I contacted Detroit and asked them for their opinion and they said that on the basis of an associate salesmen deal if Mr. Zell wanted to give him some automobiles it would be

all right. In fact, I received those instructions from Detroit.

"Q. With whom did you talk in Detroit on that? A. Mr. Abernethy told me that.

"Q. What did you mean by the associate [425] salesmen's arrangement? A. Well, we have an associate salesman arrangement where someone can sell cars—where a dealer can have associate salesmen to sell automobiles in his territory.

"Q. Would that be the territory which was formerly covered by the dealership arrangement? A. No. Factually speaking, Mr. Zell could appoint any such man as an associate salesman any place within his own zone of influence, which would be Baltimore and the Baltimore area, which he would have at that time.

"Q. Now, with reference to DeBaugh's request, the associate salesman arrangement referred to what territory in so far as DeBaugh was concerned? A. I would imagine it would be Towson.

"Q. Is that where he operated under—— A. That is where he is located.

"Q. —dealership? A. That is correct.

* * *

[426] "Q. Did you ever discuss it further with Mr. DeBaugh? A. No. Other than when Mr. DeBaugh—cross that over. No. When Mr. DeBaugh was in the office he mentioned that to me, and in view of the fact that I had the Detroit approval I may have referred him to it at that time.

"Q. You mean that he discussed that he could sell cars if Mr. Zell okayed it over there? A. Yes.

"Q. And, of course, that meant he would buy the cars from Zell? A. Yes.

"Q. Zell would supply him with the cars? A. Yes.

"Q. He in turn would sell it retail out [427] in Towson where he was originally the dealer, is that it? A. Yes.

"Q. And that, I presume, would be true with reference to parts, Packard parts? A. That would be, yes.

* * *

[439] "Q. Do I understand you correctly to say that you went to Salisbury—which took you how long to drive, by the way? A. Well, I would say three or four hours.

"Q. Three of four hours—with a definite purpose in telling Mr. Webster that the dealership in, a sole dealership in Baltimore from that time on, would go to Mr. Zell, but you never told him; is that right? A. Yes. Because developments were that I didn't need to tell him that.

"Q. How did the conversation open up at this conference down in Deal? Why did you tell him you came down? A. We—Mr. Porter and I went to Salisbury. We walked into the hotel at Salisbury and Mr. Webster was waiting for us. He informed me that Washington had been endeavoring to call me. He said, 'I'll tell the operator.' The operator was here (indicating) and over here (indicating) were the telephone booths. As I recall it, he said, 'This is Mr. Beck. Get the Washington call.' I sat in the telephone booth and he stood outside. He said, 'You know, Donald is now in Washington working [440] for the Government.' Well, I

said, 'How come Donald is in Washington without calling me?' And we got our telephone call from Washington, and proceeded into the dining room. Now it was my full program—and after thinking about this trip, that Mr. Webster, Dick Webster and the Webster family had very definitely been personal friends of mine—which, of course, has nothing to do with the Packard business from a business standpoint—and I fully intended of saying nothing to Mr. Webster until after we had completed our lunch and that we were able to either go out in the car or possibly find a location in the lobby of the hotel. When we walked into the dining room, Mr. Porter excused himself and said that he wanted to go down to the men's room. We hadn't any more than sat down at the table when Mr. Webster elaborated to me about that he wasn't at all satisfied with the way the situation was in Baltimore in his Packard dealership. He told me that he had hoped that Donald would be able to take over the business, and that the organization up there refused to cooperate with Donald and that because of the heavy investment—and I believe he mentioned about $200,000—that he had invested in the seafood [441] business at Deal Island, which made it impossible for him to give that up and go back and operate the business. And I said, 'Well, Dick, it is the consensus of opinion of the Detroit officials that you should give up your Packard business in Baltimore.' He then discussed with me how that could best be done. I told him that perhaps it would necessitate the renting of the real estate, which I was of the opinion had a good rental value, or that he could

find tenants at that time, and he agreed that that would be what he would do. When we left he asked me not to say anything about it to anybody, that he didn't want to let anyone in on it or have anyone know it except the bookkeeper—and if you can tell me what his name is—Mr. Graf. He said he was the only one who would know about it. We finished the lunch and we walked out of the hotel. The last thing he said to me, 'Be looking, Marsh, I will ship you up a barrel of oysters in a couple of days.'

"Q. Anything said to you about Zell? A. Zell's name was not mentioned, but in the conversation with Mr. Webster he did say, 'When I get back to Baltimore,' he said, 'I might stop in and see Sidney.' And I assumed he meant Sidney Zell.

[442] "Q. Did you say anything at all about, 'You know, Dick, that Zell will be very fair to you'? A. No, sir.

"Q. Nothing was said about Zell by you at all? A. No, sir.

* * *

[452] "Q. Do you recall who it was first conceived the notion of Mr. DeBaugh being an associate salesman of Zell? A. I have subsequently learned that it was between Mr. Porter and Mr. DeBaugh.

"Q. The Mr. Porter who we have just been talking about, Mr. C. M. Porter? A. Yes.

"Q. Did anybody suggest it that you know to Mr. Porter? A. No.

"Q. Was it Mr. Porter's idea, you think? A. Yes. Or Mr. DeBaugh's.

"Q. Made to him? A. Either one or the other, yes.

* * *

[456] "Q. Do you remember now having received the telephone message from Abernethy? A. Yes.

"Q. Was the telephone message with regard to the thing noted in the handwriting on the end of the letter here? A. May I see that again?

[457] "Q. Yes, sure. A. Yes. Yes.

"Q. Now, did you at any time receive any telephone call to the same effect from Mr. Armstrong? A. Not that I recall.

"Q. Do you recall why it was Mr. Abernethy said that he wanted you to get an amendment dated 7/1/52? A. I believe in the discussion it was brought out to fullfill the terms of my letter to Mr. Webster.

"Q. You are now referring to the letter which was dated February 14th? A. Yes.

"Q. In which you fixed what you called to be the deadline of July 1st—— A. Yes.

"Q. ——1952, for the liquidation of the business? A. Yes.

"Q. And also did that include the termination of the contract between Packard and Webster? A. It would be the termination of that particular contract.

"Q. Which contract do you refer to? A. The one that I was instructed to offer him.

[458] "Q. Well, you were instructed by whom to offer what? A. I was instructed by Detroit to

offer Mr. Webster a Packard sales agreement with a 7/1/52 termination date.

* * *

[459] Mr. Leahy: I believe we were at page 151. The witness had just answered: "That is right. Yes. I got that call, Mr. Leahy, on the first of the month."

"Q. First of April? A. Yes.

"Q. Who was it now, that gave it? Abernethy? A. I have no—I don't have a—it was one of the Detroit officials.

"Q. Now, where did you offer him the cancellation with the amendment 7/1/52? A. I offered him a Packard sales agreement."

Mr. Leahy: Then an interruption. I offered him the regular renewal amendment of a Packard franchise with a 7/1 termination date.

"Q. 7/1/52? A. 7/1/52 termination date.

"Q. So instead of an amendment it was a termination date? A. It was an amendment with a 7/1 termination date."

* * *

[460] Mr. Leahy: 153, Your Honor.

"The Witness: I informed Mr. Webster that I was in a position to give him an amendment with a 7/1 cancellation date providing he would sign it. And he informed me that he never did—that he hadn't been in the habit of signing the agreements and that he would discuss it with Donald on his trip to Washington within [461] a week and would drop in at my office. It is a question of whether I actually offered it to him or whether I told him

that I was in a position to offer it to him, but I didn't actually show him the form.

"Q. When you offered him this amendment to the Packard dealer sales agreement, was it by saying that you had it and were in the position to offer it to him, or actually offered it to him, you made it clear that the matter was final insofar as Packard was concerned and that Webster had to liquidate by that date? A. I recall making a statement—as I recall the statement, I told him that in accordance with our original agreement that he was going to liquidate his Packard business by July 1st, and that we expected him to follow through on that program.

"Q. Where was it that you made this proffer, either by actually giving it to him, handing it to him, or saying that you were in the position to give it to him? A. It was at Deal Island.

"Q. And on what date? A. On April 3, 1952.

"Q. Did you tell him or describe to him what the amendment meant to him? A. Yes.

[462] "Q. What did you say? A. I told him that it would be an advantage for him to sign this amendment because the one in effect in his dealership did not include a clause relative to the repurchase of certain Packard parts, and that this new amendment did, and that as a result that at its termination he would be able to return the Packard parts to the Packard Motor Car Company in accordance with the stipulation in the new amendment.

"Q. Did you on the occasion of telling him about this amendment advise him anything at all about the meeting in New York of Zell and the others? A. No: I did not.

"Q. Or of the telephone message which you had received from Detroit about which we have asked before? A. No; I did not.

"Q. Now, had you advised Zell in the meantime that you were going to try to get Mr. Webster to sign this amendment to the Packard dealer sales agreement we have just discussed? A. I am of the opinion that Mr. Zell and I did discuss the July 1st understanding that I had with Mr. Webster. I have no knowledge of Mr. Zell knowing from me that we were going to offer a July 1st [463] amendment with a 7/1/52 termination date.

"Q. Had you advised Zell that Mr. Webster had agreed to terminate or liquidate his business on July 1, '52? A. I believe in a discussion I did.

* * *

[466] "Q. But you didn't know anything about Zell's feeling at this particular time growing out of the difficulty of getting this liquidation amendment signed? A. No.

"Q. Never came to you at all as to what Zell thought about it? A. Zell had discussed it—had called me up and come over and discussed it with me, and I always had told Mr. Zell that our intention was to make Baltimore a one-dealer point, but under no circumstances did I ever tell Mr. Zell when it would happen.

"Q. Did you ever tell him that you might have to renew it for a year? A. Yes.

"Q. When did you tell him that? A. I believe that in conversation we had [467] with him or sometime along the line I told him that we had offered

the Webster Motor Car Company a Packard sales agreement for a year.

* * *

"Q. Well, did you ever discuss with Zell at all prior to March 21, 1952, that it might be necessary for Packard to renew the Webster dealership for another year but that he, meaning you, would terminate or see to the termination of that franchise during the year or at least at the end of that ensuing year? A. I personally never told him that.

"Q. Do you know whether anybody did? A. I do not.

[468] "Q. Never heard of that discussed? A. Not to my recollection, although I have a faint recollection that a subject like that was discussed.

"Q. By whom, do you know? A. By Mr. Fenn and other Packard officials.

"Q. Do you know what other Packard officials were present? A. No; I don't.

"Q. Was Zell present with Fenn? A. Yes; I believe he was.

"Q. You don't know when, however, whether it was on the occasion of Fenn's visit as indicated by Porter's dealer contact report with the Zell Motor Company on or about 3/18/52? A. No; I have no recollection.

[469] "Q. But you do recall that you had heard that Mr. Fenn and Mr. Zell and some other of the Packard officials had discussed that subject? A. Yes.

"Q. Now, do you know what Zell is talking about when he tells Fenn that he is 'requesting some evidence of good faith that this delay will not be

repeated at the expiration of the coming contract year'? A. No; I do not.

"Q. Do you know what he is referring to when he says that he 'should be assured in writing, but that he is confident that the legal department will frown on that suggestion'? A. I wouldn't know, Mr. Leahy.

* * *

[471] "Q. You identify that as your signature, do you, advising Mr. McGill about the termination of the DeBaugh Motors in Towson, Maryland? A. Yes.

"Q. Effective as of March 31, 1952.

[472] "Do you recall that on or about that date you received any telephone call from Mr. Webster about his dealer's agreement? A. Mr. Webster did call me.

"Q. Do you remember what date? A. I do not; no.

"Q. That was Mr. Richard Webster? A. Yes.

"Q. Do you recall whether it was made to your home or your office? A. I recall—and I can't be positive on this—but I have a recollection of talking to him from my office. All I recall of the conversation, and I do recall——

"Q. Do you recall that he asked you with reference to the retention and renewal of the dealer's agreement? A. Yes.

"Q. What did he say? A. He wanted to know what our reply was to his two letters he had sent us, and that I told him that they were sent on to Detroit and I would have to wait for their decision, and that

we closed the conversation where I said, 'Well, Dick, keep on pumping water until I hear from Detroit.'

* * *

[475] "Q. Did you have a statement, Mr. Beck, that you desired to make before we went on with the examination? A. Yes. In order to correct the record with reference to some previous testimony with which I was not entirely clear, our attorneys refreshed my recollection last night with a letter dated March 3 to Mr. Abernethy in Detroit pertaining to a conference that I had with Mr. Zell and Mr. Fenn on February 29, I believe, at which time we discussed the possibility of our giving Webster a Packard franchise for another year.

"Q. Who was present at that conference? A. The best of my recollection, Mr. Zell, Mr. Proctor, Mr. Fenn, and myself.

"Q. What induced the conference? A. The fact that Mr. Zell had asked me for a definite date as to when we would make metropolitan Baltimore a one-dealer city.

* * *

[476] "Q. Do you recall Exhibit 10, the letter which Mr. Webster wrote you, dated February 20, which we talked about a bit yesterday? A. Yes.

"Q. Did you send that on to the factory? A. I did.

"Q. To whom did you send it? A. I am not certain, but I would ordinarily send it to Mr. Abernethy.

* * *

[489] "Q. So you didn't have any notion whatsoever of cancelling DeBaugh's dealership because

of the conference in New York or the telephone call on February 11th? A. Yes; the cancellation was a result of the conference in New York.

"Q. All right. Now, also was the trip down to the Eastern Shore of Maryland? A. Yes.

* * *

[493] "Q. And your program was to put a one-man dealership in Baltimore, and didn't you plan on implementing that program by ousting Webster, and isn't that why you went down there to tell him that you were going to oust him on the first of April? A. No.

"Q. Did you plan to tell him about the meeting in New York? A. No.

"Q. Did you plan to tell him about the telephone message from Detroit, that Detroit had established this new policy? A. If he would have asked me, I would have told him.

"Q. How would he have asked you about your telephone message to Detroit? [494] A. I don't know.

"Q. You don't know, do you? A. No.

"Q. No.

"Your answer is that you didn't intend to tell him; isn't that right? A. No. I wouldn't say that I didn't intend to tell him.

"Q. You knew that he didn't have any information about your telephone message to Detroit, didn't you? A. Yes.

"Q Well, then, how would he have the occasion to call you and ask you about it? A. I wouldn't know.

"Q. You knew he couldn't—don't you? Isn't it a fact that you went down there to tell him that the factory had made this new policy at the conference in New York and the consideration given to it afterwards and on information given to you on February 11th that from that point on there was going to be a sole dealership in Baltimore? A. No.

"Q. And that that dealership was going to be in Zell? [495] A. No.

* * *

[496] "Q. Why did you go down to Deal the second time? A. To offer him a Packard franchise.

"Q. To do what? A. To offer him a Packard franchise with a March 31st—or with a July 1st cancellation date.

"Q. Why did you hit July 1st as the cancellation date? A. Because I had so stated in my letter.

"Q. And why did you state it in your letter? A. In dictating the letter the thought was entirely my own, that, well, we ought to put a date as to when this will be effective.

"Q. Well, now, your testimony is that at that conference down there in southern Maryland, at Salisbury, that Mr. Webster had said to you that he was going to liquidate his business? A. That is correct.

"Q. Why didn't you hand him a mutual [497] cancellation form? A. Well——

"Q. You did with Schulte, didn't you? A. Yes.

"Q. Why didn't you do the same with Mr. Webster? A. Well, that is what I should have done but I didn't.

* * *

[498] "Q. Did you get advice from anybody with reference to the amendment? A. Yes.

"Q. Whose? A. Mr. Abernethy—one of the officials in Detroit. I think it was Mr. Abernethy.

"Q. In conversation with him? A. Yes.

"Q. What aroused that conversation? A. I wouldn't know.

"Q. Did it come from Mr. Abernethy or did you initiate the call? A. It came from Detroit.

"Q. Do you know why it came from Detroit? A. I do not.

"Q. Do you know what the content now was of the telephone call? [499] A. Other than that he told me that we should offer Mr. Webster a contract with a July 1st expiration date.

"Q. Why? A. I don't know.

"Q. Did he have a copy of your letter in which you had fixed the date? A. He did.

"Q. Did he comment on that? A. Yes. I believe he did.

"Q. What was his comment? A. He said that because of the stipulation that I had in the letter to Mr. Webster that we should fulfill it and that I should offer him a Packard sales agreement up to that date.

* * *

[500] "Q. Don't you remember Mr. Armstrong's comment to the effect that because you had written the letter in the manner and form in which you had written it that it looked as though you had already tendered a renewal contract? A. Yes. I believe he did say that.

"Q. He did say that, didn't he? A. Yes.

* * *

[501] "Q. But, in all events, it was the thought in Detroit that to avoid embarrassment so far as the factory was concerned that you should go through with a tender to July 1st? A. Yes.

* * *

[508] "Q. He had written you and you had received his letter of the 20th of February? A. Yes.

"Q. And you also had received a letter, had you, about the 9th of March from him? A. I believe that is correct.

"Q. And these had been forwarded on to Detroit? A. Yes.

"Q. Had you written or communicated with him since the 9th of March? A. Not to my knowledge.

"Q. So he called you as late as the 30th of March, isn't that right, on a Sunday? A. I do not recall it being a Sunday, Mr. Leahy.

"Q. Was it at your home? A. I am of the impression that I talked [509] to him from the office but I would not be positive.

"Q. All right. But in all events the subject matter of the conversation in so far as Mr. Webster was concerned was his renewal of his dealership? A. Yes.

[510] "Q. And you knew that he wanted it renewed, didn't you? A. Yes.

* * *

[518] "Q. Now let's go back to March 30th. Now, you did know on March 30th that Mr. Webster wanted the renewal of his contract? A. Yes.

[519] "Q. Is that right? A. Yes.

* * *

[524] "Mr. Smith: May I ask that the question and answer be read because I am quite sure that the witness was confused? The long question about Zell being satisfied.

"(Question and answer read as follows:)

" 'Q. Is it your testimony that Zell was perfectly satisfied to go along indefinitely as a Packard dealer when he was complaining that he was constantly in the red without any assurance as to the date when it was going to be made a one-dealer city? Is that your testimony? A. My testimony is—yes.'

"The Witness: I would like to correct that and say, it is not my belief that Zell would have gone along indefinitely, but I do feel that any reasonable length of time would have been satisfactory to all concerned.

"*By Mr. Leahy*:

"Q. Who was to determine the reasonable length of time? A. I imagine I was.

* * *

[525] "Q. So that you don't know, then, how Mr. Zell got the information about the July 1st deadline which he got in his letter of March 21st? [526] A. No. I discussed with Mr. Zell the fact that I had called on Mr. Webster and that we had—and that I had written him telling him that we would expect him to have accomplished the completion of his Packard franchise by July 1st.

"Q. Why was it necessary to tell Zell about that? A. Well, he asked me.

[527] "Q. Why did you think he had any right to know? A. Because we had agreed to put in that kind of a program in Baltimore."

[At this point, the transcript of the Beck deposition contains the following passage, which was not read to the jury:

"Mr. Smith: Mr. Leahy, may we suspend a couple of minutes?

"Mr. Leahy: Certainly.

"Mr. Smith: I have got a telephone call from New York.

"Mr. Leahy: Surely.

"(A short recess was taken.)

"(Record read.)"]

"I would like to change that answer.

"Q. Why? A. I discussed it with the attorneys.

"Q. Why do you want to change it? A. Well, I would just like to rephrase the wording of it.

"Q. Why do you want to rephrase the wording of it? A. To give my actual recollection.

"Q. You want to eliminate the word 'agreed,' don't you? A. Yes.

"Q. That is what you want to do, isn't it? A. Yes.

"Q. That is what you were discussing with the attorneys? A. Yes.

"Mr. Smith: Mr. Leahy, is it not proper for the witness to correct the testimony if he believes that he made a mistake?

"Mr. Leahy: Perfectly proper. And it is also proper [528] to find out why he believes he made a

mistake in a common English word, in the verb 'agree'. The implications are clear. However, go ahead. Make your statement.

"The Witness: Well, would you read the question again?

"(Question read as follows:)

"'Q. Why did you think he had any right to know?'

"The Witness: Because we had discussed with him our intentions of making Baltimore a one-dealer city.

* * *

[534] "Q. Now, on April 3rd at Deal, did you have anything to say to Mr. Webster as to whether he would or would not get a renewal of his contract? A. Yes. I recall—I have a recollection of telling Mr. Webster that it was our intentions to follow through on the original agreement that we had with a—that I had with him in Salisbury on February 13th.

"Q. Now, you constantly call that agree- [535] ment, don't you? What agreement had he made with you? A. Well, an understanding. I would be happy to change it to an understanding.

* * *

"Q. What instruction did Detroit give you? A. That they wanted me to follow through with their instructions on making Baltimore a one-dealer city.

"Q. Well, you couldn't make Baltimore a [536] one-dealer city by putting Webster in as a second dealer, could you? A. That is right.

"Q. Then you were down there to see that Webster would not get his dealership? A. No, Mr. Leahy. My sole purpose in going to Deal Island was to offer him the franchise and the fact that I told him that we would expect him to follow through on his telling me that he would get out of the Packard business, I believe, was his own decision.

"Q. Didn't you have with you the amendment which had already contained in it—— A. Yes.

"Q. —a limitation date of July 1? A. Yes.

"Q. What? A. Yes.

"Q. Now, you had no authority to fix July 1, did you? A. No.

"Q. No. That came from Detroit, didn't it? A. Yes.

"Q. All right. Your instructions then [537] were to offer him what you offered him? A. Yes.

"Q. A renewal with a termination date of July 1? A. Yes.

"Q. That was to implement the policy which had been determined on of one dealer in the Baltimore area? A. Yes.

"Q. What? A. Yes.

"Q. That is right, isn't it? A. Yes.

* * *

[547] "Q. Is this letter, April 15, 1952, what you recall that you received from me? A. Yes.

* * *

[548] "Q. You had earlier made the suggestion after Mr. Donald Webster's telephone call around about March 1st with you that the matter should be conducted from that point on under the advice of your counsel; isn't that right? A. Correct.

"Q. To whom did you refer? A. Mr. Abernethy. I mean, I referred——

"Q. Is he an attorney? A. No. But I referred it to him.

"Q. To whom? A. To him; yes.

[549] "Q. And from that point on were you careful to follow Mr. Abernethy's advice? A. Yes.

"Q. And did you seek Mr. Abernethy's advice in every step that you took? A. Yes, yes.

* * *

"Q. Now, how many days was it after the receipt of that letter which you state you tendered a renewal of the contract to—— A. 4/18.

[550] "Q. 4/18.

"Did you do that personally? A. No. I had been instructed to do it from Detroit.

"Q. Did you personally tender a renewal contract? A. No, no.

"Q. Who did, do you know? A. Mr. Porter, Mr. Howell.

"Q. Mr. Porter and Mr. Howell? A. Yes.

"Q. Did Mr. Abernethy say that the tender should be made in pursuance of the letter that had been received from me to you? A. I do not recall, Mr. Leahy, that he did, but the course of events would indicate that was the fact.

"Q. In all events, chronologically your recollection now is to the end that—— A. Yes.

"Q. —whatever tender was made by Mr. Porter, did you say,—— A. Yes.

"Q. And Mr.—who else? A. Mr. Howell.

[551] "Q. And Mr. Howell. That it was made subsequent to the receipt of this letter? A. Yes.

"Q. And I am now referring to what has been formerly marked in evidence as Defendant's Exhibit No. 52, and may it be considered as in evidence here as Exhibit 20?"

I will offer that under the stipulation, if Your Honor please, because there was handwriting on it.

The Court: It will be admitted.

The Deputy Clerk: Plaintiffs' Exhibit No. 40.

(Letter from William E. Leahy to Packard Motor Company, Washington, D. C., with handwritten notation on bottom of letter made by Mr. Beck was marked and received in evidence as Plaintiffs' Exhibit No. 40.)

* * *

[552] "Q. You sent it on to Mr. Fenn, didn't you? A. Yes.

"Q. On the 17th? A. That is correct.

"Q. And you were over at Baltimore to see Mr. Webster or the president of Mr. Webster's organization [553] over there, weren't you, on the 18th? A. Well, yes, yes.

"Q. Porter and Howell were over at Mr. Webster's place of business on April 18th, weren't they? A. Yes.

"Q. With a contract of renewal; is that right? A. Yes.

"Q. Not restricted to July 1st? A. Yes.

"Q. As to termination date; isn't that right? A. Yes.

* * *

[554] "Q. Do you recall why it was that you were instructed from Detroit to tender a contract for the year on the 18th of April after you had been down on the 3rd to Deal Island with an amendment with the termination of July 1st? A. I do not definitely have a recollection of why they did it.

"Q. What was the purpose in making the change from the 1st of July to the 31st of March, '53, as the termination date, do you know? A. I do not know positively, but it could have been this letter.

"Q. Well, didn't Mr. Abernethy say anything to you when he called you up about that? A. I don't recall of getting a telephone conversation definitely from Mr. Abernethy. I recall a telephone conversation relative to offering them—giving them a yearly renewal.

"Q. And why, do you know? A. I assume that it was a result of this letter.

* * *

[556] "Q. What did they report back to you as the result of the conference they had? A. My recollection is that they discussed the matter with Mr. French, the president of the Webster Motor Car Company, and that he wanted them to leave the agreement, and they of their own choosing decided not to.

"Q. Had you instructed them not to leave the agreement? A. I had not.

"Q. Did you instruct them to return with it again? A. I believe at a later date. Didn't we give —I am of the opinion at some later date we gave them a sales agreement and asked it to be returned by a certain date.

* * *

[557] "Q. Why did you ask him to go back on the 22nd? Was that under instructions from—— A. It must have been, Mr. Leahy.

"Q. Was it under Mr. Abernethy's instructions, do you think? A. I think it was.

"Q. Do you know why? A. My recollection is the original sales agreement was in blank and that the second one we filled in completely and returned. I think Mr. French or someone offered an objection because the agreement was in blank.

"Q. Had you been instructed to present a blank agreement? A. No. No. No. In that connection I would like to say that in having the dealer sign the agreements [558] in blank is a natural procedure in the Washington Zone.

"Q. Since you have taken over, has it been signing a blank? A. The signing of dealers has been pretty much in the hands of our district managers, but I don't know whether it is a Packard policy, but we work our contracts from a work sheet because of the fact that contracts must be typed and, naturally these men don't have facilities to do that, and then all contracts are typed in by my secretary. And I would say in most—I would say in practically 100 per cent of instances after they are signed.

* * *

[559] "Q. Did you tell Mr. Zell that you had been down and seen Mr. Webster at the Wicomico Hotel? A. Yes.

"Q. And you told him that you were going to try to get him to liquidate the business by July 1st? A. Yes.

"Q. And did you tell him that that was the date that you were going to fix? A. I did not. If he got such a date he assumed it.

"Q. Well, he got the date July 1, however, from you? A. Yes; he did.

[560] "Q. Now, whether it was a deadline or not was his assumption, is that it? A. That is correct.

"Q. You didn't tell him it was a deadline? A. That is correct.

"Q. And then didn't you tell Zell after you received Mr. Webster's letter of February 20th that you were having trouble about that? A. Yes. I told him that we were—that we may experience some difficulty in—yes.

"Q. In getting Mr. Webster to agree to liquidate by July 1st? A. Yes.

"Q. Is that right? A. Yes.

"Q. Why didn't you send him a cancellation notice such as you sent DeBaugh? A. Well, to be absolutely—to give you my own reason for it and my opinion is that I wanted to be absolutely fair with the Webster organization in giving them every chance to get out of the Packard business on as clean a basis as possible.

"Q. Didn't you want to be fair to DeBaugh? A. Well, DeBaugh didn't have the investment that

Webster did, and I figured that a longer period of [561] time would enable them to accomplish the job on a much sounder and better basis is so far as they were concerned.

* * *

[563] "Q. Well, to return. You had kept Zell advised, then, with your negotiations, about your negotiations with Webster; isn't that right? A. Yes; I would——

"Q. You told him about having cancelled out DeBaugh, too, didn't you? A. Yes.

"Q. And he was pushing you all the time, wasn't he? A. He was asking me when it was going to happen; yes.

* * *

[573] "Q. Did Mr. Briggs have anything at all to do with regard to this matter of putting into effect this program of a single dealer in Baltimore? A. Yes.

"Q. Do you recall that at or about the time of the letter which was written to you by me on April 15th that you had a meeting here in Washington? A. Yes.

"Q. Was Mr. Zell present? A. Yes.

"Q. What sort of a meeting was that? A. It was a dealer meeting. It was a [574] spring meeting where all of the dealers are invited and their sales managers. It was held at the Shoreham Hotel.

"Q. Were you present with Mr. Zell during that meeting? A. I attended the meeting; yes.

"Q. Do you know whether Mr. Briggs was there? A. He was. He conducted the meeting.

"Q. Do you know whether he chatted with Mr. Zell at all about the matter in Baltimore? A. After the meeting Mr. Briggs invited the dealers up to his suite for cocktails, and Mr. Zell and many other dealers were in the suite.

[575] "Q. Do you recall whether the subject matter of the Baltimore situation was discussed? A. I understand it was.

* * *

[576] "Q. Well, all right. Let me show you a letter which I will ask you if you can identify signatures on that? It is dated May 14th. A. Yes.

"Q. '52, that is, isn't it? A. Yes.

"Q. Did you ever see that letter before? A. Only from the documents from our attorneys.

"Q. Does it ring a bell with you at all? A. Yes.

"Q. What? A. Yes. Let me read it. Yes.

"Q. Do you recall any conference or talk between Mr. Zell and Mr. Briggs about the Baltimore situation in putting into effect this policy? A. I saw them talking in the suite.

"Q. Didn't hear about it, did you? A. I heard part of the conversation.

"Q. Were they talking about putting into effect the sole dealership plan? A. Yes.

"Q. What? [577] A. Yes.

"Q. What did they say about it? A. Mr. Zell wanted to again ask Mr. Briggs when we—when this would become effective.

"Q. What did he say? Mr. Briggs. A. I do not recall."

* * *

[591] AFTERNOON SESSION

(At 1:30 o'clock p.m., following a luncheon recess, counsel and the Court conferred in chambers, and the following proceedings were had:)

Mr. Leahy: Judge, I hardly know what to say or how to begin. I have chatted with both Mr. Webster, and I have talked also with his son, Donald. I thought that after the discussion this morning which I had with Mr. Webster, and also a further discussion just a few moments ago with Donald, who in turn had been talking with his father, that I thought perhaps he could convey direct to Your Honor just what the results of the conversation were. I don't know just what I can say more than that.

Mr. Donald Webster: Your Honor, I would like to preface my remark——

The Court: Why don't you move a little closer?

Mr. Donald Webster: Yes, sir. I would like to preface my remarks of the amount which we would be willing to accept at this stage as a settlement of our claim against Packard by saying that it is an extremely difficult position to name to anyone, including yourself, or to Mr. Leahy, an amount of money which we would be willing to accept. I can't tell you all the reasons why it is difficult. There are tax consequences. There are unsettled questions of law. To come to the figure, we would accept $400,000 [592] from the Packard Motor Car Company in the settlement. It might be too high. It might be too low.

The Court: I don't think it is too low. You see, you have to figure what is the most that you are likely to get from a jury if you win hands down.

Mr. Donald Webster: I understand, sir. I think we have done our best to lay the risk that we run, and all the advantages that we, and I think other people stand to gain by having this case tried to its conclusion.

The Court: You consider too that no matter who wins this case it will no doubt go to the Court of Appeals.

Mr. Leahy: Undoubtedly.

The Court: And a case like this will take a year and a half before you get a decision from the Court of Appeals. Of course, it will take long to get your record ready and your brief ready, and they will take their sweet time in writing their opinion after it is argued.

Mr. Denit: That figure, of course, so startles us.

The Court: I beg your pardon?

Mr. Denit: That figure so startles us as to indicate that it wasn't made with a view to compromise at all.

The Court: Oh, well, I have seen very wide gaps bridged in these negotiations. I am never impressed by the fact that people are very far apart. I am too calloused for that.

[593] Do you care to state a figure?

Mr. Denit: We couldn't indicate to Your Honor anything that would anywhere near approach that figure.

The Court: You probably wouldn't to start with. I wouldn't expect you to.

Mr. Denit: Either start or finish, because of this reason: As we analyze plaintiffs' claim, the itemized claim that is presented here, it will come down ulti-

mately to an average loss per year of about $6,000, not $30,000 or $30,000-odd as indicated.

The Court: Of course, I have gotten the figures from the plaintiffs' memorandum, and I don't know whether they will substantiate it or not, but if they are substantiated, the annual loss is more than that.

Mr. Denit: That is true, if they are substantiated, but Your Honor has one or two gaps that Your Honor will have to rule on and that is '47 and '48 it now appears were unusual years in the industry, and not average years by any sense. They were a seller's market as distinguished from a buyer's market.

The Court: But I know in '52 their net profit was a little larger than in '50, so they were on the upswing there.

Mr. Denit: Very little larger, yes, sir.

The Court: Of course, as I say, I don't know [594] whether those figures are going to be substantiated, but on the basis of those figures, if they are substantiated, I wouldn't be surprised to have the jury say, "Well, let's take an arbitrary figure of $20,000 or $25,000 average net profit per year." And suppose the jury limits it to the unexpired term of the lease and stops there? That's what I would be inclined to do if this were a non-jury case, because I might say, "Lord knows what would happen to the rental after the lease expires." Even so, even at $20,000 a year, for seven years you have $140,000. Now, then, whatever the jury does I will have to multiply by three.

Mr. Denit: We don't concede, of course, that plaintiff should get to the jury in this case.

The Court: No, of course not. I may direct a verdict for the defendant, for all I know, and then the plaintiff will appeal, and the Court of Appeals might say I was wrong and order a retrial. Or the jury might find a verdict in plaintiffs' favor and I might grant judgment NOV. But the case will go higher. So you have to figure not only on the possible outcome of the trial, but the possible final outcome of the litigation. Now, I don't know whether any judgment in this case would carry interest or not, pending appeal. The judgment would.

[595] Mr. Denit: The judgment would.

The Court: Then when you have a judgment say in six figures, interest is a big item, interest for a year is a big item. And then attorneys' fees. Of course, you might win. You might win either from the jury or from the Court. That's why I think it is the kind of a case that ought to be compromised on about a 50-50 basis. But as I say, I am not trying to urge you gentlemen to compromise. I would just as soon try this case as the next one. As a matter of fact, this is a more interesting one to try than many I have. For instance, the case immediately preceding yours was a case involving rape of a nine-year-old girl. I would much rather try this case than the other.

Mr. Smith: I agree with Your Honor that the $400,000 figure is not too low. It is fantastic. I wonder if Your Honor isn't overlooking the fact that the figures he has been talking about are based upon adding in Richard's salary instead of deducting it, as we pointed out to Your Honor the other day.

The Court: I think of course Mr. Webster's salary was part of the expense.

Mr. Smith: But they don't so treat it.

Mr. Leahy: We do to the motor industry. What do you want the motor industry to supply, expenses for another [596] industry?

Mr. Smith: You are attempting to add to the profits of the Websters the $15,000 salary. The $15,000 salary.

Mr. Webster: May I explain what we tried to do? Your Honor, the only case which we have found on the damage question of a problem of this sort that dealt with this problem of the owner's salary, and whether it should be taken out in reducing the profits of the dealership was the Emick v. General Motors. Emick contended there that in computing what his past profits had been he should add back in, as Mr. Smith stated, that we have done, and inaccurately so, add back in all the salary that he paid himself. General Motors made this argument, and we can supply Your Honor with the briefs of General Motors, they said that certainly it is not fair if Mr. Emick worked at the Emick Motor Car Company for him to add back all of the salary he paid. He must have been worth something. What he should have done is to make a fair allowance expense which is for the salary that he paid himself. That is what we in fact have tried to do here. We have said that on the fact, and it seems undisputed, that Richard Webster spent only 20 per cent of his time in the production of automotive income, spending the other 80 per cent in the Somerset Seafood Company and investment operations,

that it is therefore appropriate to allocate [597] now to Webster's expenses, Webster Motor Car expenses, 20 per cent of the actual amount.

The Court: You have deducted that, or have you added it? Mr. Smith says you have added it.

Mr. Webster: No, we have treated it as an expense of the automotive operation, 20 per cent of the actual salary that Richard Webster paid himself from the Webster Motor Car Company, because he worked 80 per cent of his time in other——

The Court: Why isn't his whole salary to be deducted?

Mr. Webster: I don't think, Your Honor, if the General Motors Company, in an expensive piece of litigation was making good reasoning and good argument, I think on their theory it wasn't, but I would rather go behind it and say that if we are trying to determine——

The Court: The mere fact that General Motors makes a particular argument doesn't impress me. It isn't even weighty.

Mr. Webster: Is it of any interest?

The Court: I am interested in the argument on its merits, but not on the fact that General Motors made it.

Mr. Webster: I agree with you. I feel this, that an owner of a business, let's assume this gentleman and I, I am the owner of my business, but I do not work in it, and I do not contribute to the production of my income in it. But [598] my business for various reasons is very well run and makes a great deal of money. If this other party destroys my business, the fact that he has destroyed that business means

that he has cut off or destroyed its ability to produce income. How I as the owner distribute that income is not conclusive in my opinion, sir, that it means that I earned the income by relationship to the salary that I paid myself.

The Court: Yes, I think this line of reasoning completely overlooks the corporate entity. There is a big difference between an incorporated business and say a partnership. If your father paid himself a salary of $5,000, and declared dividends that would net him $10,000, you wouldn't say that dividends are part of the damages, would you?

Mr. Webster: You would not say they are part of the expenses.

The Court: But a salary is part of the running expenses. I may have to rule on that at the proper time if the occasion arises. I think there is a weakness in your line of argument in that it ignores the existence of the corporate entity. I always have a feeling that negotiations aren't advanced very much by delving into detailed arguments on the [599] law. That has its place when the Court is called upon to rule. Do you want to suggest a figure? I think that's the only way to make progress.

Mr. Smith: I am sure there is no use in suggesting a figure, in view of the fantastic figure suggested by Mr. Webster.

The Court: I have seen people ask for an astronomical figure, and then after a few negotiations—it is so in this district. Mr. Denit knows. It is so in this Court—people get together. I am not insisting that you suggest a figure.

Mr. Smith: I am quite willing to tell Your Honor the figure which we have been authorized to offer, and that is $25,000.

The Court: If you want me to express my reaction, my reaction is that both figures are out of the way. You can find a middle ground.

Mr. Smith: I really believe, Your Honor, that as the case progresses Your Honor's evaluation of the case will decline.

The Court: I am assuming of course that your contention is, as appears from the Beck deposition, that what transpired at the Hotel Wicomico conference is different from Mr. Webster's version.

[600] Mr. Smith: Might I state our position with respect to that conference?

The Court: Yes.

Mr. Smtih: That it doesn't make any difference in the case at all; that that conference makes no difference in the case at all.

The Court: Oh, I see. I thought that your position was that at that conference Mr. Webster offered to liquidate, and therefore he wasn't forced out.

Mr. Smith: It is our position that Mr. Beck's version of what took place in that conference is correct. But our position is that it couldn't really make any difference what was said at that conference.

The Court: That's a question of law, isn't it, whether this arrangement that was actually made, whether that's a business arrangement permitted by the Sherman Act, or whether it is banned by the Sherman Act. Doesn't it come down to that?

Mr. Smith: There is a question of law whether on all the facts there is a violation of the Sherman Act. But there are many facts the plaintiff has to establish before he has established a violation of the Sherman Act. Those facts cannot be possibly established by the testimony about what occurred at the hotel at Salisbury.

The Court: Doesn't this case amount to this; and [601] you know every case, no matter how complicated it may seem at first, simmers down to one little point. Doesn't this case involve this basic question of law, whether an arrangement between Zell and Packard whereby at Zell's instigation Packard agreed to go on with a one-dealer basis for the Baltimore area, and, in order to accomplish that it put the two other dealers out of business, whether that is an ordinary permissible business transaction, or whether that's a conspiracy banned by the Sherman Act? Isn't that all there is to this case?

Mr. Barker: No.

Mr. Denit: One more point.

Mr. Smith: It is not. It is not. There are several issues in this case which we contend the plaintiffs cannot prove. One is whether there was a conspiracy within the meaning of the antitrust laws. That is the only issue Your Honor has been discussing.

The Court: Yes.

Mr. Smith: There are several other issues as I believe Your Honor noted in our memorandum of law.

The Court: I have noticed two or three factual issues. For instance, whether if the plan was illegal, whether the curse was taken off the plan by

offering a year's renewal. I suppose you would raise that question.

Mr. Smith: I wouldn't agree to that statement [602] of the issue. The issue is whether or not any act, any wrongful act on the part of the defendant, caused the alleged injury to the plaintiff, and the alleged injury to the public. Our position on that is that the plaintiff caused any injury which occurred, the plaintiff, and himself, and not the defendant.

The Court: Of course, all these matters are matters which I may have to rule on, and I don't want to rule on them in advance.

Mr. Smith: I might add that there are a couple of other issues which the plaintiffs must establish in order to recover under the antitrust laws. One is that the alleged acts of the defendants caused injury to the public. Another is that the alleged acts of the defendants substantially interfered with interstate commerce.

The Court: I am going to rule I think pretty much definitely that it must involve injury to the public. But it seems to me that there is prima facie evidence that they did.

Mr. Smith: We would not agree with that.

The Court: So far.

Mr. Smith: We would not agree that there is prima facie——

The Court: I don't know how you may refute it, but so far they made a prima facie case in that by eliminating [603] competition between dealers the public is affected, of course.

Mr. Smith: We do not agree with that.

The Court: I know you don't agree to that, but I think they made a prima facie case on it. You may be able to refute it. I don't know.

Mr. Hughes: Could I mention, Your Honor, before you break up the conference, that we have losses traceable to the Nash operation? In other words, to minimize damages. We have losses of $26,000, which are capital losses, which are from whatever angle looked at——

The Court: There is a question of law, of course, whether expenses in attempting unsuccessfully to minimize damages are recoverable. Of course, neither side has any case on that in its memorandum. If there are no authorities I should hesitate to rule that it is a recoverable item.

Mr. Hughes: I think we can submit authorities on it, Your Honor. We have already looked it up.

The Court: I don't think unless anyone or either side has anything further to suggest at this time that there is anything further for me to say. I do want to make this observation: I shouldn't think that this case for either side could be settled except with six figures rather than five.

Mr. Hughes: Do you want to make another offer, Mr. Denit?

[604] Mr. Denit: No, sir.

Mr. Hughes: Mr. Smith?

Mr. Smith: No.

The Court: I suppose it's your turn.

Mr. Webster: I don't know that it is at all politic—I don't mean to use that phrase—I don't know that it is wise to say this, but it is realistic—to remind Your Honor that had this money come to us

over a period of years, we would have been able under the law to have I would think less of a tax impact than we will. This way, according to a recent ruling in the Supreme Court we are going to have to pay 52 per cent of anything that these people pay us immediately to the Treasury. That's not a very appealing proposition to us.

The Court: I had my salary increased recently and I have to pay most of it in additional taxes.

Mr. Smith: That problem will be completely solved if as we anticipate plaintiff recovers nothing.

Mr. Webster: May I say this, Your Honor: I think in our method of expression, I have not talked in terms of fantastic amounts. Perhaps you are right. Perhaps it is too large a figure.

The Court: I don't think that your figure is fantastic, or the other side is ridiculously low. I think both of you are entirely reasonable, according to your rights. [605] But a settlement involves a compromise. It isn't anything that can be computed by a mathematical formula.

Mr. Webster: I certainly agree with Your Honor that it can't be, and I think that my father and I have weighed the advantages pro and con of trying this case, and since we seemed to be so far apart, unless the other side has some reasonable offer to make——

The Court: I think both sides are reasonable. Both offers are reasonable to start with. I think perhaps as Colonel Hughes indicates, perhaps it is his turn.

Mr. Hughes: Well, Your Honor, I am not in a position where I can name any figure at all. You see, I am way down on the totem pole, as the story

goes. I think Mr. Webster represents his father, and he is the one to——

The Court: But the difficulty is that he is the plaintiff's son, and I think it is always hard to negotiate under those circumstances, because he cannot be as objective as Mr. Leahy, as you can be.

Mr. Webster: That is precisely what I said to Mr. Leahy when I came in here. Isn't that right?

Mr. Leahy: Precisely.

Mr. Webster: I recognize, and in a sense it is a tender position to be in—I realize my judgment is not as good——

The Court: You are almost representing yourself, [606] you are so close to the picture.

Mr. Webster: It is representing the family, sir.

The Court: Yes.

Mr. Leahy: I think we had better sleep on it over the weekend.

The Court: I think a middle ground can be found, and I have an idea of just where you will find a middle ground if you look for it hard enough.

Mr. Webster: I would like to just say in conclusion of what I might have to say, Your Honor, on that figure of $400,000, that my father figured $400,000. I figured $500,000. So it shows that he is perhaps more reasonable about it than I am. I did it on the basis of that is one times what the jury can bring in. If I am wrong about that, and the Appellate Court sustains Packard, and the Supreme Court refuses to review, then we made a mistake. But we are out now, out of pocket—it isn't a matter of necessity with me or my father, and it isn't purely a matter of principle. I don't mean to appear com-

pletely idealistic with you—but we, as Mr. Leahy says, will sleep on it.

The Court: Look, Mr. Webster, you have to consider this: How much is the jury likely to bring in on the most optimistic aspect of the matter? Suppose you win hands down before the jury? Suppose the jury gives you $200,000? They might give you less. Suppose they give you $200,000? It [607] is my duty to multiply by three. You recover $600,000. They might give you $150,000. They might give you $125,000. So your figure is too close to 100 per cent of the maximum that you are likely to recover to be a basis of the settlement. A settlement involves a compromise.

Mr. Webster: I was figuring, Your Honor, as per our brief, that we——

The Court: Not as per your brief. You have got to figure on what the jury is likely to do, not what you say in your brief.

Mr. Webster: I understand.

The Court: And for the same reason I think their offer is too low. I think there is a middle ground.

Mr. Webster: I will say that we have not considered any middle ground, but we certainly will.

The Court: No negotiation ever succeeds if either side expects to stand by its statement.

Mr. Webster: We were in the automobile business, Your Honor.

The Court: You are business men, and I have always found that it is easier to settle a case with business men than with other people because business men are used to the idea of give and take.

Mr. Leahy suggests that maybe each side sleep on the matter over the weekend.

[608] Mr. Leahy: We will take to heart what you said, Your Honor.

* * *

[610] Mr. Denit: Now, the cross-examination, which was by my associate, Mr. Smith, beginning at page 268.

[611] "*Cross-Examination by Mr. Smith*:

* * *

[612] "Q. Your letter to Mr. Webster dated February 14, 1952, which is Beck Exhibit 9, states:

"'It was the consensus of opinion that because of the existing circumstances in your Packard dealership in Baltimore, Maryland, that your best interest could be served by liquidation of this dealership, thereby terminating your Packard franchise.'

"In this letter and in your testimony about conversations with Mr. Webster, I believe, you used the word liquidation. What did you mean by your use of the word liquidation in that letter and in that testimony? A. I had reference to the closing out of his Packard business.

"Q. Did your use of that term relate to the disposition of the physical assets of the company? A. Only those pertaining to the—no: [613], only those pertaining to the closing out of the Packard franchise, the termination of the Packard franchise.

"Q. Well, did it make any difference to Packard what the dealer did with his physical assets? A. No. We had no interest in that.

"Q. And you had no interest, I assume, in having the dealer liquidate physical assets? A. No. And in that connection I can say that I recall suggesting to Mr. Webster that maybe he could take on another make of car, so that would substantiate that conclusion.

* * *

[616] "Q. You testified about a telephone conversation with Mr. Zell on February 11, 1952, and I believe you said that you got the date from the attorneys. How did you get that date from the attorneys? A. Well, that date was established through examination of a document that they had, and then was shown to me.

"Q. What was that document? A. It was a letter from Mr. Zell to Mr. Briggs; yes.

"Q. Are you looking at a copy of that letter now? A. Yes.

[617] "Q. What is it? What is the date of the letter. A. February 13.

"Q. Is that Beck Exhibit No. 7? A. Yes.

"Q. In his contact report dated September 20, 1951, with respect to Schulte Motor Company, Mr. Porter tates: 'Made contact to interview any prospects Mr. Schulte may have developed to buy his place of business.' Did you know that Mr. Porter was doing that? A. I did.

"Q. How did you know? A. He informed me that he was going to—that Schulte had run an ad in the papers, and I believe I was shown a copy of the ad, and that he was going over to interview the people that answered the ad.

"Q. What did Schulte have to sell to a prospect? A. Well, he would have his parts, furniture and fixtures, cars, if he so elected to, and tools, and possibly the lease on the real estate.

"Q. Could he sell the good will of his Packard business? A. No. Packard does not recognize any [618] good will from a Packard dealer—good will from a Packard dealer's agreement.

"Q. What was the reason for Porter interviewing prospects? A. Well, we interview prospects primarily to find out whether they qualify or are interested in going into the Packard business.

"Q. Why were prospects for the purchase of the assets of Schulte interviewed by Porter? A. Well, to find out whether they qualified to become a Packard dealer.

"Q. Was Mr. Zell's request that he be the sole dealer in Baltimore related by him to any period beyond the expiration date of such sales agreement as he might have? A. No; it was not.

"Q. In your testimony yesterday with respect to the term of Zell's lease, did you mean to convey the idea that Zell's request did relate to a period beyond the expiration date of such contract or sales agreement as he might have? A. I did not. I have no authority to change the expiration date of any Packard sales agreement.

[619] "Q. But did you intend to convey the idea that Mr. Zell's request related to a period beyond the expiration date— A. No.

"Q. —of such sales agreement as he might have? A. No.

"Q. You understood that that was the request that I referred to, Mr. Beck? A. Yes.

"Q. Did you understand, Mr. Beck, that that related to the request made by Mr. Zell at the conference in New York? A. I did.

* * *

[625] (The following redirect examination was read to the jury by Mr. Leahy:)

* * *

[626] "Q. Well, Packard makes all of its franchises for a year period, doesn't it? A. That is correct.

"Q. And your experience with Packard has been that the franchise is extended, barring some reason for its cancellation? A. Yes.

"Q. Isn't that right? A. Yes.

"Q. That is in accordance with most of the automobile franchise business, isn't it? A. I believe it is: yes.

"Q. In other words, it is a yearly contract but renewed: isn't that true? A. Yes.

* * *

[627] "Q. So that Zell's request was that he should be made the sole dealer in Baltimore or he would not carry on as a dealer in Baltimore because he had been in the red? A. Yes.

* * *

[630] "Q. Did you ever find out why it was that [631] Zell was in red in '49 and '50 and '51? A. I tried to find out through the facts reflected by the financial statement.

"Q. What did it look to be, the reason, to you? A. Well, in any business you have a certain amount

of overhead, fixed expenses, that must be offset by a gross profit, and Zell's expenses exceeded his gross profits.

"Q. Was that due to any poor business judgment upon his part? A. It could have been. I wouldn't——

"Q. Did you discuss it with him when you were business manager of the zone? A. Yes.

"Q. What recommendations did you make to Zell in that regard? A. Well, my recommendations, as I recall them, were an increase in new car business, an increase in service business, and an increase in parts and accessories business.

"Q. You mean that he should attempt to increase in those departments? A. Yes.

"Q. Did you tell him how he could do that? [632] A. Well, in the new car department that could be accomplished through better sales efficiency and more manpower, and in the service department it could be accomplished through advertising and service specials and over-all general service promotion.

"Q. You made those recommendations during the period that you were the business manager? A. I did.

"Q. And yet not once from that day on did Zell operate in the black, did he? A. Yes; he was in the black.

"Q. Well, in the year, I mean. A. In the total year?

"Q. Total year. He was always still in the red? A. Yes.

"Q. Now, did you ever ask Webster whether he could handle Baltimore alone? A. I did not.

"Q. The location which Webster had was on York Road, wasn't it? A. Yes.

"Q. And for the business which his dealership could do, was that a pretty good location? A. I don't have sufficient knowledge of [633] the city of Baltimore to say whether that was a good location or not, Mr. Leahy.

"Q. Did you at any time advise Webster with regard to his location as to whether he should change it or do anything about it? A. Not to my knowledge.

[634] "Q. Webster always did business in the black, didn't he? A. Yes.

"Q. What? A. Yes. To the best of my recollection, that is true.

"Q. Did you ever give Webster a chance to discuss taking over as the sole dealer in Baltimore City? A. I did not, Mr. Leahy.

"Q. Did you ever explore with him what capital was available to him? A. No, sir; I did not.

"Q. Or his willingness to relocate to any spot? A. I did not.

* * *

"Q. Did you ever talk with Mr. Webster with [635] regard to getting into volume operation for the entire city of Baltimore? A. I did not.

"Q. Did you ever discuss with Mr. Webster whether he would be willing to expand his service facilities in order to take care of the demands of Packard in Baltimore? A. I did not.

"Q. Did you ever do it with Zell? A. No; I did not. Zell had expressed a desire to expand his organization and increase his facilities.

"Q. Well, that was upon the condition that he would be made the sole dealer? A. Yes.

"Q. Did you ever give Webster the same chance? A. No; I did not.

"Q. Did you ever survey Zell's facilities or Zell's capital structure or did you ever get any report as to the general location of the Zell's business to determine whether the spot in which Zell was located was the best available spot for the purpose of taking care of Packard's business as the sole dealer in the Baltimore area? [636] A. I did not.

"Q. Who did? A. No one to my knowledge.

"Q. Do you know what the capital structure of Zell's business was? A. I was familiar with the over-all picture.

"Q. How much capital did he have invested? A. On this deal that takes in the whole of the dealership for the whole metropolitan area, as I recall it, necessitated approximately $200,000 working capital, probably a little less.

"Q. In addition to what he had? A. No. That is working capital. That is the difference between current liabilities and current assets.

"Q. Well, what did he have before the sole dealership idea was put in? A. He had the same—he had sufficient capital.

"Q. Well, did he increase his capital to take care of the entire city as the sole dealer? A. Not to my knowledge he didn't.

"Q. Did he increase or expand his service facilities? A. No.

[637] "Q. Did he change his show room or location? A. No; he did not.

"Q. Is it pretty much the fact that he remained in the same location and conducted business in the same way he did before? A. Well, he greatly improved his new car sales department by putting——

"Q. By increasing the number of sales? A. By putting in a new car sales manager and at the same time, which he discussed he would do, he told us that he would employ one of the best used car sales managers in town, which I understand he did.

"Q. Let me see—that new car sales manager you spoke about that he said he would get and did get he got from Mr. Webster, didn't he? A. That I would not know.

"Q. You don't know that? A. I do not know.

"Q. Who is that? A. Dale Proctor.

* * *

[639] "Q. Didn't he complain about the fact that Schulte was taking sales right from him, Zell? A. Yes. He made such complaints.

"Q. Isn't that the reason why he asked you not to fill the Schulte dealership, didn't want the competition of another? A. I wouldn't say that he didn't want the competition, but he felt there was so much business available in the area or in the city he felt that he had the ability to get the available business for Packard.

"Q. If he had the sole dealership? A. Yes.

"Q. In other words, Zell's feeling was that there was X amount of business to be gotten in Baltimore? A. Yes.

"Q. And if he were the sole representative as dealer of Packard in Baltimore, he could get that X business? [640] A. That is correct.

"Q. And what he wanted to do was to get those other dealers who were competing with him out of business so he could get the X business for which he promised to expand his facilities, put on a new manager, in the new car department, and a new manager in the used car department; is that right? A. Yes.

"Q. And that is what he discussed in New York in January that we talked about? A. Yes.

"Q. Do you remember pretty well these conversations you had with Donald Webster at the time of the fire back in '49? A. I don't remember specifically all of our conversations.

"Q. But your memory and recollection are both clear enough now so that you can state that you at no time recommended to Webster that he should buy the property in which the business was being or had been conducted? A. Automobile manufacturers have a policy which has been my experience—particularly Packard—where they at all times advise management against recommending to dealers any real estate investments [641] because obviously if a dealer made a good real estate investment and made a lot of money at it, he may give up the Packard franchise and sell the real estate, and if—therefore we do not make recommendations as to the purchase of real estate. And that is one of the fundamental principles of the manufacturer, and that was—and I have always adhered to that, so I know that I didn't make any such recommendation.

"Q. Well, is it because you believe that you had adhered to the policy or you have any recollection of what you said that caused you to say that 'I didn't recommend the purchase of the property'? A. Knowing that, I didn't recommend the purchase of it.

"Q. Did you talk with Mr. Webster at all about whether or not he should buy the property or did he discuss it with you? A. Mr. Donald Webster did discuss it with me, told me that there was some question about the landlord rebuilding, and that they had an opportunity to buy the property for—as I recall the figure, Donald—it was $35,000, and that he felt that it was a very good deal, and that if he felt so, naturally we thought it to be a fact.

"Q. Well, now, do you recall at that time [642] canvassing the situation with Donald as you were discussing this? A. Canvassing, no, I didn't canvass any——

"Q. Do you recall making any such remark in substance at that time by saying that, 'Well, the landlord lost his property by fire and it is usually a pretty good time to make an offer to a landlord when his place is burned down'? A. I would say I did not, Mr. Leahy, because I never have had such a thought in my mind and I never heard anyone say it, so I would say I did not say it.

"Q. Did you advise with Donald at any time with regard to the mechanics he should adopt in regard to leasing, tax benefits, or anything of that sort in connection with the fire? A. I did not.

"Q. Did you discuss it in any way with Mr. Webster, Sr.? A. I did not. I would like to qualify that, that one of the definite instructions that we have from the Packard Motor Car Company is to never give any tax advice because we may be called upon some day by the Government to explain our purpose. That is another fundamental principle that we——

[643] "Q. Did you do anything to help Webster in this situation in which he found himself when the place had burned down? A. We told them that we had a building department in Detroit that would be very glad to submit to him plans for the rebuilding of his property and layout at no cost to him, if providing they wanted to avail themselves of the service.

"Q. Well, did you in any way encourage Webster to stay in business after the fire? A. My recollection of it, is that I was very much in the dark as to whether they were definitely going to stay in business until I got Donald's letter with a copy of an ad attached to it so stating in the Baltimore paper.

"Q. Hadn't you discussed the matter with him? Weren't you interested in seeing to it that time that Webster should continue in business? A. Yes.

"Q. You were? A. Yes.

"Q. Wasn't it perfectly natural for you to help out your dealer? A. Yes, sir.

"Q. You mean to say that none of that [644] talk that we have been discussing now occurred at all? Didn't you discuss tax benefits with Donald? A. No. I never—no.

"Q. Did you discuss them with Denholm? A. No.

"Q. Never discussed tax benefits in any way? A. No, sir.

"Q. Never discussed the lease or the length of the lease in any way? A. No, sir.

"Q. Never discussed whether or not he should rebuild or buy? A. No, sir.

"Q. And you didn't even know he was going to stay in business until you saw his ad in the paper? A. My recollection is that I did not have a definite understanding that the deal would be revised until I saw the ad in the paper.

"Q. Your interest is just as you describe it to us now, as close to minimum as one can get with reference to a dealer who just suffered a loss through fire, isn't it? A. Well, I don't know how long, Mr. Leahy, [645] the ad was—the letter or the ad was run after the fire. It may have been two or three days before I even got into the situation.

"Q. Have you any memory now of anything you talked about with Mr. Webster after the fire? A. Only our offer to help him lay out plans and to submit plans.

"Q. So you made the suggestion to him that he could write to Detroit to your building department if he wanted to and he would get some plans? A. No.

"Q. Is that all you did with reference to all this? A. To my recollection, yes. Donald came over to see me two or three times.

"Q. About what? A. About their plans.

"Q. Plans about what? A. About staying in the Packard business.

"Q. And what did you discuss with reference to staying in? Didn't you discuss a place where they could go? A. We discussed the rebuilding of the York Road place.

"Q. You did discuss that? [646] A. Well, the fact that they were going to rebuild it, they were either going to rebuild it themselves or have the landlord do it.

"Q. Then you did discuss the rebuilding? A. Yes.

"Q. Did you advise him in your judgment he ought to stay at that location and rebuild? A. I did not.

"Q. When he suggested that he might do that, did you approve it in the sense of saying that I think you are smart or anything like that? A. I don't recall that.

"Q. Did you discuss the question of rebuilding in any way with him? A. We discussed the rebuilding. I mean we talked about it, what they proposed to do.

"Q. Well, you do remember he came over on three occasions from Baltimore to Washington? A. I wouldn't say three. I remember him coming over to Washington.

"Q. How many times? A. I wouldn't know.

"Q. What you remember about is what you didn't say but you can't remember anything you did say, is that it? [647] A. We—or I offered Mr. Webster the services of our building department in Detroit, and I went over there and made some measurements. In other words, before they can lay this out, Mr. Leahy, we have to give them a drawing of the property. And I went over and compiled the information as to the layout of the property and the certain dimensions of the property that was left after the fire.

* * *

[648] "Q. Now, is there anything further that you can remember that you did or Denholm did with regard to the fire than that you made the offer that

you would help them use the facilities of Detroit and that you made measurements, and so forth? Is there anything you can further remember? A. Well, when the plans came back from Detroit Mr. Braden and I took them over there.

"Q. To whom? A. Well, Mr. French was there and Donald Webster was there that afternoon.

[649] "Q. Did you go over them with them? A. That was our intention, but as I recall it we didn't get to it.

"Q. Did you leave the plans over there? A. I believe we did.

"Q. Just one further question, then I will be through. You say that with reference to Mr. Webster that he as the owner of the Webster Company either could not or did not devote his whole time to it. Do you recall whether you said he could not or did not? A. I had recollection of the conference that I had in Salisbury with him when he told me that his heavy investment in the seafood business wouldn't permit him to do it. And it could be answered both ways. He told me at that time he could not. Over two or three years he did not devote his full time to it.

"Q. Well, do you recall whether Zell devoted all his time to the Packard business? A. It is my opinion that Zell spends the greater majority of his time at his Packard business. I mean, that is my opinion.

"Q. Do you know? A. Not definitely, no, sir.

"Q. Did you know he ran a finance business [650] independent of the Packard automobile business? A. I understand that; yes.

"Q. Doesn't he have a race stable, too? Didn't he? A. I understand that he did. I never was familiar with it, Mr. Leahy.

"Q. Well, the fact of the matter is that when you were discussing this matter that you said in which Mr. Webster made the statement that he had this other business that he was heavily interested in, you did not at that time ask him whether or not if he were given the sole dealership in Baltimore he would be willing to devote all of his time? A. That is correct, Mr. Leahy."

* * *

[651] FRANKLIN DEBAUGH, JR., was called as a witness by the plaintiffs, and being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Leahy:

Q. Mr. DeBaugh, I am going to ask you if you will keep your voice up so that I can hear you. You hear me all right, don't you? A. Yes, sir.

Q. Keep your voice up so that all the ladies and the gentleman of the jury can hear you, and His Honor at the bench. A. Yes, sir.

Q. Would you state for the record your full name, Mr. DeBaugh? A. Franklin DeBaugh, Jr.

Q. And where do you reside? A. In Towson, Maryland.

Q. And how long have you lived there? A. Thirty-four years.

Q. In what business are you engaged? [652] A. Automobile business.

Q. In what type of the business are you engaged at present? A. At the present time I am selling used cars and repairing cars.

Q. Where is your place of business in Towson? A. 101-105 Pennsylvania Avenue.

Q. How long has it been located at that address? A. I started there in April, 1921.

Q. Did you at any time have a Packard franchise, as a dealer, to sell Packard automobiles? A. I did.

Q. Did you have your place of business at that time at the same place where it is located now? A. I did.

Q. When was it that you first became engaged in the sale of Packard automobiles? A. In September, 1936.

[653] Q. Was your place of business then the same as it is now? A. You mean the same location?

Q. The same location? A. Yes, sir.

* * *

[655] Q. Did there come a time after you began business in 1946 when for a period your contract was not renewed? [656] A. In 1948.

Q. Do you recall who was the manager of the Washington zone at that time? A. Mr. Sam Braden.

Q. Did he at that time make any statement to you as to why your contract was not to be renewed in '48? A. It was on account of the scarcity of cars.

Q. What did he say to you about that? A. He came over to my place one evening and said he was very sorry but he would have to cancel my contract for about a year or maybe a little more, that there wasn't enough cars being manufactured to keep the other dealers going, and if I didn't mind dropping out for about a year, he would see that I would get it back.

Q. Did he see that you got it back? A. He did.

Q. When was that? A. Well, that was in the latter part of '49.

* * *

[657] Q. Do you recall when there came a time that you received notice that Packard would not renew your contract any more? A. Yes, sir.

Q. Do you recall when that was? A. That was the 5th of March in '52.

Q. Did you at that time receive a notification in writing? A. Yes, sir.

Mr. Leahy: That letter, I believe, has already been introduced, if Your Honor please, and I will not take the time of the Court in reading it again. I have forgotten the exact number under which it was introduced.

The Court: It doesn't make any difference. If it is in evidence it doesn't have to be identified again.

By Mr. Leahy:

Q. You received a letter from Mr. Beck, did you not? A. Yes, sir.

Q. Stating that your contract would not be renewed again? [658] A. That's right.

Q. Do you recall about what date that was? A. About the 5th of March.

Q. What notice had you prior to the receipt of that letter that your contract was going to be terminated? A. None.

Q. What complaint had been lodged against you, if any, with regard to your conduct under the contract and franchise to sell Packards? A. None.

Q. Did you do anything such as calling up Mr. Beck or getting in communication with him after receiving that letter? A. Yes, sir.

Q. What did you do, Mr. DeBaugh? A. I called Mr. Beck the first time and he wasn't in, and two days later I called him again. He told me that he would send Mr. Porter over to explain to me why I had been cancelled.

Q. Did he send Mr. Porter over? A. Yes, sir.

Q. Did anyone come with him? A. Mr. Sam Howell came with him, I think, at that time.

* * *

[659] Q. When either or both came into your place of business, I am assuming they came to your place of business, did they? A. Yes, sir.

Q. About what time of the day was it? A. In the afternoon.

[660] Q. What did they say to you, and you to them, on this occasion? A. Well, Mr. Porter said that it cost them just as much to keep a small dealer in business as it did to keep a large one or nearly as much, and that they were cancelling out a lot of small dealers. That's what he told me.

Q. Cancelling out the small dealers? A. A lot, he said.

* * *

Q. Do you recall whether a performance report with regard to the number of cars assigned to you as a quota was ever made by Packard with regard to what you did? A. We got that report once a month.

Q. When you say "we," do you refer to the dealer now? A. Yes, sir.

Q. You got the report of what you did with regard to your quota for the month just preceding, did you not? A. Yes, sir.

Mr. Leahy: This is under the stipulation, if Your Honor please. May I just have it marked? I offer it.

The Court: It will be admitted.

The Deputy Clerk: Plaintiffs' Exhibit No. 50.

* * *

[661] *By Mr. Leahy:*

Q. What did that report show? A. That report I had the best month before that I had ever had, and I was leading the whole area on percentage points.

Q. And what was your percentage of your quota in that month? A. 250.

Q. 250 per cent of the quota? A. Yes, sir.

* * *

Q. Did they say anything further than just what you told the ladies and gentlemen of the jury? A. They said that—Mr. Porter, I think, suggested that he might stop down to see the Zell Motor Car Company and see if I could sell cars for them the same as I sold them before the war.

Q. When you sold cars for Zell before the war, what was the arrangement under which you sold those cars? [662] A. Well, when I would sell a car I would go down there and get it and pay for it and deliver it.

Q. From whom would you buy it when you said you paid for it? A. The Zell Motor Car Company.

Q. Did you have any transactions directly with the factory? A. No, not then.

Q. Not at that time? A. No, sir.

Q. Were you entitled to buy any cars direct from the factory before the war when you were dealing as you said with Zell? A. No, sir.

Q. In other words, were you compelled to buy from Zell? A. Yes, sir.

Q. Who fixed the price you were to pay? A. They did, Zell.

Q. Meaning whom? A. Zell Motor Car Company.

Q. What else did you buy from Zell before the war? What have you got to say with regard to parts? A. Parts and accessories.

Q. From whom did you buy your parts? [663] A. From Zell.

Q. Any right to buy direct from the factory? A. No.

Q. Who fixed the price of the parts before the war? A. Well, they did. They fixed the price.

Q. You mean Zell? A. Yes, sir.

Q. Did you render service in the repair of automobiles before the war? A. Yes, sir.

Q. What relation did that have to Zell? A. Well, I bought the parts. I had to buy the parts from the Zell Motor Car Company to repair the Packard cars with.

* * *

[674] Q. What was further said by either one or both to you if they did say anything further?

* * *

The Witness: I don't just recall how far we had gotten, but Mr. Porter said that he would stop down to the Zell Motor Car Company, and see if he could arrange some sort of an agreement down there with Mr. Zell so I could sell cars through them.

By Mr. Leahy:

Q. Through whom? A. Zell Motor Car Company.

Q. Did Mr. Howell say anything on that occasion that you recall now? A. No, sir, I don't believe he did.

[675] Q. Did Mr. Porter say anything further or call anybody at that time on the telephone? A. No, sir.

Q. Did you further at any time learn whether or not Mr. Porter had said anything to Zell Motor Car Company about your buying cars from Zell Motor Car Company? A. I did, yes, sir.

Q. How did you learn that? A. The next couple of days I called Mr. Zell and asked him if Mr. Porter had talked to him, and he said he had, and I was to go down in a couple of days and have a talk with Mr. Zell about the arrangements.

Q. Did you do that? A. Yes, sir.

Q. When was it approximately, if you can recall, that you went down to the Zell Motor Car Company and talked with them, or anybody? A. I don't recall that date.

Q. Do you recall whether it was still in the month of March, or was it in April? A. I think it was in March. Yes, sir, it was.

Q. Whom did you see at Zell Motor Car Company? A. I saw Mr. Proctor and Mr. Zell.

Q. Who was Mr. Proctor at that time? A. I think he was the general sales manager at that [676] time.

Q. Did you discuss with them anything with relation to whether you should buy cars from them, or could? A. Yes, sir, I did.

Q. Would you tell us the conversation? A. I asked Mr. Zell how much the cars were going to cost me by getting them through him than they had been costing me by getting them through the factory. He said that he would make an agreement with me that I could have the cars at a 5 per cent markup above cost.

Q. Would you explain what a 5 per cent markup above cost means? Is it cost to him, the Zell Motor Company?

A. Five per cent above their cost, the Zell Motor Car Company.

* * *

[677] Q. How did the cost which you paid Zell compare with the cost which you paid the zone? A. It was about $162 more than I would have to pay the Zell Motor Car Company than I paid the Packard Motor Car Company.

Q. And in what did that $162 excess consist? Do you remember? A. Well, it consisted—the reason it was more was because Zell charged me for reconditioning the car.

Q. And when you say "reconditioning" what do you mean? A. Getting the car ready for delivery.

Q. And before that time, when you were a direct dealer, who got the car ready for delivery? A. I did, in my own shop.

Q. Go ahead. A. And then he charged me for Blue Coraling it—that is polishing it—and also for undercoating, but I could do all those things in my own shop.

[678] Q. What do you mean by undercoating? A. Well, I have a Fendex material that you spray under the car to keep the noise down.

Q. And before that, when you were buying directly from the zone or from the Packard Motor Car Company, who did the undercoating? A. We did, in our place of business.

Q. What effect, if any, did that $162 extra that you paid, or above that you paid to Zell, how did that affect your customers or your own dealings with the public with regard to selling your cars? A. Well, that cut me down quite a lot because I couldn't allow my customers enough to compete with the rest of the dealers.

Q. Do you recall at sometime after this that you had occasion to come to Washington and see Mr. Beck? A.

The first time I came over Mr. Beck was out. The second time I came over we went over after a couple of new cars. It was on the 1st of April, when I talked with Mr. Beck.

Q. And where was it you talked with Mr. Beck? A. In his office.

Q. And where was that? A. That was in the Packard Motor Car Agency.

Q. Was that the zone office, as we have been calling [679] it? A. Yes, sir.

Q. Who was present, if you can recall? A. Well, when I first went in there wasn't anybody present but Mr. Beck and myself. In a few minutes my bookkeeper came in.

Q. And who was your bookkeeper? A. Mr. Ward.

Q. Did you have any discussion or talk about your relationship with Mr. Zell? A. No.

Q. Or the Zell Motor Company? A. No, sir. We talked to Mr. Beck, or I did, and I asked him why I had been cancelled; that I didn't think Mr. Porter had given me enough information, and Mr. Beck told me that the reason I had been cancelled was because that the Zell Motor Car Company had been operating in the red, and that they would have to do something about it to get them in the black. And they cancelled me out for a while—cancelled me there.

Q. Did you have any further chat with him with regard to how you were going to get any cars in the future, if you were going to get any? A. Then we started to talk—just about that time Mr. Ward came in, and Mr. Beck repeated what he had told me, [680] and then we started to talk about getting the cars from the Zell Motor Car Company. I suggested that I might get the cars out of Bel Air, and Mr. Beck said no, I would much rather you would get the cars from the Zell Motor Car Company.

Q. When you said Bel Air, what did you refer to? A. The Packard place up at Bel Air.

Q. Was that a large or a small dealer? A. Small.

Q. A small dealer? A. A small dealer.

Q. How did it compare with you? A. He was a little bit larger than I was.

Q. Was he cancelled? A. No, sir.

Q. And then did you have any further chat with Mr. Beck? Was anything said with regard to what it might cost you, or anything of that sort? A. I don't think we talked—I told Mr. Beck that it would cost me a good bit more that way, and he said, Well, try and put up with it for about a year and we will see what happens.

Q. Now, did there come a time when you had occasion to have any conversation with Mr. Webster? A. Well, that trip over to Washington was on the 1st [681] of April, and a couple of days after that I called Mr. French——

Q. And who was Mr. French? A. —who is the general manager—president of the Webster Motor Car Company, I think, and I asked him—I called him to get some information about a car and some parts. In the meantime I asked him if he knew that I had been cancelled, and then he said, No, he hadn't. So in a few more days after that Mr. Webster called me up and asked me if I would come down to his office and have a talk with him, which I did. My son and I went down.

Q. Do you recall approximately when you went down? A. Well, I would imagine it would be around the 6th, 7th or 8th of April.

Q. Whom did you see when you got there? A. Donald Webster and Mr. Webster and Mr. French.

Q. And you say your son was with you? A. Yes, sir.

Q. And what was the conversation at that time? A. Well, Mr. Webster told me that they had been cancelled to, and that he was going—I am just hitting the high spots of the conversation——

Q. That's all, just give us the substance; we don't want you to give too much detail. A. And he was going to seek legal rights, and wanted [682] to know if I thought that I would, and I told him that I had been shell-shocked pretty badly during the first World War and that I didn't care to get mixed up in anything like that. And that's the reason that I didn't sue along with him.

Q. Do you recall whether or not at that time there was any discussion as to purchasing a new car, so that you would have something in writing to show what the actual cost to you was? A. I don't know whether we discussed it at that time, but we did a couple of days later, or in the immediate—a couple of days later I think we discussed that I should go down and buy a new car from Zell Motor Car Company to get proof of what was going on.

Q. Did you do that? A. Yes, sir, I did.

Q. And did you receive invoices and did you pay by check? A. I did.

* * *

[684] *Cross-Examination by Mr. Denit*:

Q. Mr. DeBaugh, how many new cars did you sell in the calendar year 1951 and 1952? A. You mean from January 1st to January 1st?

Q. Yes, sir. A. I don't remember exactly. I would imagine twelve or fifteen.

Q. Wasn't it ten? A. I wouldn't say exactly.

Q. Reference was made to your being 250 per cent over your quota at a certain period. What was your quota at that time? A. Two cars a month.

Q. Were there any months you didn't sell any cars during the year 1951-52? A. Some months maybe I didn't sell any. I wouldn't recall without the records.

Q. How many cars did you purchase from Zell Motor Car [685] Company after you were discontinued as a dealer? A. One.

Q. And that was the one transaction that you have just referred to? A. Yes, sir.

Q. Who put up the money for the purpose of making that transaction? A. Mr. Webster loaned me the money for it.

* * *

[690] Q. What did Mr. French say on that occasion, when you visited the Webster Motor Car Company office? A. Well, I don't remember everything Mr. French said. I don't remember half of the things that were said there at that meeting.

Q. Did French say anything? A. Yes, he had a few things to say, but not very much.

Q. Who did the talking? A. Mr. Webster, mostly.

Q. Which one? A. Mr. Richard Webster.

Q. What did he say to you he asked you to come down there for? A. He wanted to talk over with me how the Packard Motor Car Company had treated us, cancelled us out, and let Zell have the whole area to themselves.

* * *

[692] Q. Did you go there to make an arrangement to take over the Bel Air dealership? A. I did.

Q. And Packard did nothing to prevent you from doing that, did it? A. No, sir, not as I know of.

The Court: Where is the Bel Air dealership located?

The Witness: It is in Harford County. That is about 20 miles above where I am.

[693] The Court: Is that considered in the Baltimore area or outside of the Baltimore area?

The Witness: Outside of the Baltimore area.

By Mr. Denit:

Q. Wasn't the reason that you didn't undertake to secure the Bel Air dealership the fact that the rent was more than you thought you could afford to pay? A. Yes, the rent was too high.

* * * *

[694] *Redirect Examination by Mr. Leahy:*

Q. You were asked some questions, Mr. DeBaugh, with reference to Bel Air. How far did you say Bel Air was from Towson? [695] A. About 20 miles.

Q. How far is Bel Air from Baltimore? A. Pretty near 30, about 27 or 30 miles.

Q. And you were asked whether you voluntarily decided that you would keep Towson, your own place of business, and not go over to Bel Air and close up Towson. Do you remember that? A. Yes, sir.

Q. Did you know Mr. Porter was talking with Mr. Zell and Mr. Proctor about whether they would be satisfied if you took over Bel Air? A. No, sir.

Q. Did Mr. Porter tell you anything about that? A. No, sir.

Q. Did Mr. Beck? A. No, sir.

Q. By the way, did Mr. Beck ever tell you anything about a conference up in New York on January 29th? A. No, sir.

Q. Did he ever tell you what the plans or the intentions of the company were with regard to giving Zell or making Baltimore a one-dealer point? A. No, sir, he did not.

* * *

By Mr. Leahy:

[696] Q. You were asked too, I think, as to whether or not you had ever bought more than that one car. Do you remember [697] that? From the Zell Motor Company. A. Yes, sir.

Q. Why didn't you buy more? A. Well, I couldn't compete with their prices down there. And I sold what I had, and I have been selling used cars since then.

Q. Had you been able to compete when you were buying directly from the factory? A. Yes, sir.

* * *

[698] Q. Do you recall after this particular suit was filed that you got any telephone calls from Zell Motor Company? Or did you go down there and have a talk with anybody in the Zell Motor Car Company? A. After the suit was filed?

Q. Yes, sir. What did they tell you?

Mr. Denit: Wait a minute. We object to that unless the person he talked to is identified.

Mr. Leahy: I am just asking him the question.

By Mr. Leahy:

[699] Q. Who was it you saw down there and talked with, if you did see anybody? A. Mr. Proctor.

Q. And who was Mr. Proctor at that time? A. He was general sales manager.

Q. What did he say to you about your business? A. He said that they had talked it over and they were going to give me cars just at $100 more than cost, but since I had turned a witness against them—I guess you would call it—that Mr. Zell had decided that he wasn't going to sell me any more cars.

Q. And that is the reason you got no more cars, isn't it? A. Well, that is one of them.

* * *

RECROSS-EXAMINATION

By Mr. Denit:

* * *

[700] Q. The fact is that many people from Towson purchase Packard automobiles from Bel Air? A. Oh, yes, sir, and many from Baltimore.

Q. And many from Baltimore as well? A. Yes, sir.

* * *

JOHN WESLEY WARD

was called as a witness by the plaintiffs, and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Leahy:

* * *

[701] Q. Do you recall any conversation you had at any time in Mr. Beck's office in the Washington Zone with regard to what Mr. DeBaugh might do with relation to the Zell Motor Company in purchasing cars therefrom? A. I do.

Q. When did that conversation occur? A. April 1, 1952.

Q. And where? A. In Washington, D. C.

Q. And at what point or address in Washington, D. C., if you remember? A. 24th and M.

Q. Who was there at the time? A. Mr. DeBaugh and Mr. Beck.

Q. Where was the conversation held at that address? A. In Mr. Beck's office.

Q. Would you kindly tell us now what that conversation was, as you remember it, and what you heard Mr. Beck say? A. Mr. Beck said that Mr. DeBaugh was not renewed because Zell Motor Car Company had lost money for the last three or four years, and it was up to them to get him out of [702] the red.

Q. Did he say anything further with reference to whether or not Mr. DeBaugh should buy cars from the Zell Motor Car Company? A. He asked him to go along with them and get his cars from Zell and see what happened.

Q. Was anything said as to whether Mr. DeBaugh might purchase from the Bel Air dealer? A. Mr. DeBaugh asked Mr. Beck if Bel Air's contract had been terminated, their franchise had been terminated, and he said that it had not. He asked why couldn't he get cars from Bel Air, and he said he might get them $10 cheaper, but he would rather he got them through Zell Motors.

* * *

[704] HARRY L. FRENCH was called as a witness by the plaintiffs, and being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Leahy:

* * *

Q. Mr. French, will you state your full name, please? A. Harry L. French.

Q. And where do you reside? [705] A. 3707 Yosemite Avenue, Baltimore.

Q. How are you employed at the present time? A. I am a salesman for Martin Motors Company in Baltimore, which is the Chrysler-Plymouth dealer.

Q. The Chrysler-Plymouth dealer? A. Yes.

Q. Are you acquainted with Mr. Webster? A. Very well.

Q. And Mr. DeBaugh? A. Very well. I have known them both for many years.

Q. Did you have any business connection with the Webster Motor Car Company? A. I was employed by the Webster Motor Car Company from 1937 until we closed the company in 1953.

Q. Did you ever hold any office in the company? A. Yes. I was manager of the company prior to the war years, and was made president of the company in 1946.

Q. Who else was in the company at that time as officials? A. Mr. Webster, Mr. Richard C. Webster was chairman of the board; Mr. Donald Webster I think was vice president; Mr. George Graf, treasurer; Mr. Charley Thompson, secretary.

Q. Did Mr. Graf have any active participation in the affairs of the corporation besides acting as treasurer? A. Oh, yes. In all of our conferences and all of our [706] business meetings, why, Mr. Graf sat in as the treasurer and the man who knew all the finances of the company.

Q. Was he also a bookkeeper? A. He was the bookkeeper, also.

Q. And did he keep the books? A. He kept the books and the records.

Q. Throughout this period from 1946 until you closed business? A. Yes, sir.

Q. Where was you place of business located in 1946? A. We were located at 4410-4420 York Road. York Road is, oh, about four miles from——

* * *

Q. Do you recall any time when there was a fire at the York Road place? A. Yes, sir. We had a fire in November, 1949 which destroyed about two-thirds of our building, leaving us just a small lower section of it, and our lot adjoining.

Q. How long was it that the particular showroom was in disrepair? A. We rebuilt and got back into that showroom, mostly completed, in other words enough to occupy, about July, 1950.

[707] Q. And from that period on you maintained your business even after 1952 at that address, did you? A. We did.

Q. Do you recall that there came a time when there was discussion with regard to the termination of the franchise of the Webster Motor Car Company with the Packard Company? A. Yes, sir. That was in the early part of 1952.

Q. Do you recall when you first learned about it? A. I first learned about that around the 1st of March of 1952.

Q. Through whom did you first learn it? A. Through Mr. Webster.

Q. When did you next hear about it, personally? A. Well, I can't recall during that time; there were conversations going on between Mr. Webster and his son, Mr. Donald Webster, and myself regarding the fact that——

The Court: Don't let your voice go down, Mr. French.

Mr. Leahy: You can't tell that; we can't tell that.

By Mr. Leahy:

Q. When did you first have any conversation, if you did have, with any representative of Packard from the zone? A. That was around April 16th, I think.

Q. And where did that conversation occur, if it did [708] occur? A. That occurred in my office at 4410 York Road.

Q. And who was it from the zone office that was there? A. Mr. Cliff Porter and Mr. Sam Howell.

Q. What did either or both have to say to you and you to them? A. Well, they walked into my office and they said hello, and the usual things, have a seat, and then Mr. Porter said, Oh, by the way, here is your sports library renewal for the coming year; sign this, and here is your list; you like to add some names to it or take off some names, and you sign this list for the coming year. Also I have your projection here for the next three months, I think it was; it is a projection sheet which they would start off with that month, number of cars and how many you had sold and how many you should order, and on down for the next three or four months. I looked at that and I placed it off on my left there. Oh, by the way——

Q. Who is talking now? A. Mr. Porter; Mr. Howell was just sitting not saying anything—we have a contract here for you. Just sign this here. And I took the piece of paper and I put that off [709] on my left too. What's the matter? You have to sign this. I said, Well, this piece of paper I am looking at, it is typed but there are a lot of blank spaces in there, and I don't sign any blank papers, Mr. Porter. After all, I couldn't sign this anyway without taking it up with Mr. Webster; we always confer on these things. I said, You know in previous years we have either been notified to come over to the zone office, and at that time we go into the zone manager's office and a contract would be presented, or the spaces would be filled in with the number of cars, territory we were to cover, and we would discuss it, look at it, and then I would sign it. The zone manager, who

during this period I am speaking of happened to be Mr. Samuel Braden, would then affix his signature as the zone manager, and we would be given a copy of it. I said, I can't sign this without discussion with Mr. Webster. And after all, I don't sign blank papers, blank checks, or anything else. Well, we looked it up before we came over here; you are president of the company; you have authority to sign. I said, I am sorry; I am not signing that today. In other words, you refuse to sign? [710] If you want to put it that way. Excuse me. And I left the office and called Mr. Graf. I said, Mr. Graf, I would like to have you verify something here that I have just been stating to Mr. Porter and Mr. Howell.

Q. Was this discussion with Mr. Graf in the presence of Mr. Porter and Mr. Howell? A. In the presence of Mr. Porter and Mr. Howell, in my office.

Q. All right. A. I said, Mr. Porter has a paper here, it is not filled in. He says it is a contract he would like to have me sign, and I have just stated to him our procedure, that we have either gone to the zone, or at times our contract has been mailed to us. We have all sat down and conferred on it, Mr. Webster, Mr. Donald Webster, you, and we have looked it over to see any of the changes that ~~there~~ might be as to territory and our quotas, and then we have returned it to the zone, or we have been over there and Mr. Webster has been with me, and it has been usual procedure for them to leave it. Is that right? And he said, Yes, that's right. I said, Mr. Porter tells me he never heard of such a thing; that is not the way they ever did it at the Hudson business, or anything like that; you just signed it and that's [711] it, and I said, I refused to do it. He said, Is there anything else you want with me? I said, No, Mr. Graf, thank you.

And Mr. Graf left the office. Mr. Porter, if I recall rightly, took this projection sheet and wrote on it, "Refused to sign," and they picked up their grips and left.

Q. Do you recall whether that was April 16th or April 18th? A. I think it was the 16th, if I recall correctly.

Mr. Leahy: If Your Honor please, at this point I offer in evidence, under the stipulation, a sheet, unsigned—and to be sure about it, Mr. French, is that the unsigned paper (handing paper to the witness), or the blank paper, or the paper with many blanks on it which you said was shown you that day by Mr. Porter with a request that you sign it?

A. Yes, sir, that is it; it looks like my pencilled notations on there, sir.

By Mr. Leahy:

Q. Were the pencilled notations put on in the presence of Mr. Porter? A. I am sure they were, while they sat there, yes, sir.

Mr. Leahy: That is offered, if Your Honor please.

The Court: It may be admitted.

[712] The Deputy Clerk: Plaintiffs' Exhibit No. 59.

* * *

By Mr. Leahy:

Q. Now, you mentioned the fact that some sheet of

paper was handed to you and you put it aside, and finally at one point Mr. Porter said, All right, I will mark on there "Refused to sign." Is that Mr. Porter's handwriting on that sheet of paper, and do you now identify it as the sheet of paper you told the jury about? A. Yes, sir.

Mr. Leahy: I offer it, if Your Honor please.

The Court: It may be admitted.

The Deputy Clerk: Plaintiffs' Exhibit No. 60.

* * *

By Mr. Leahy:

Q. I now show you two other sheets of paper. The first has no date, and I ask you if that is one of those papers which you said Mr. Porter gave you for signature on that occasion. A. Yes, it is.

[713] Q. I show you a second of those two papers and ask the same question. Is that the second of the two papers Mr. Porter gave you? A. It is.

Q. And those two were left with you on that occasion you have just stated? A. Yes, sir.

The Deputy Clerk: Plaintiffs' Exhibits 61 and 62.

* * *

By Mr. Leahy:

Q. Do you recall having seen either Mr. Porter or Mr. Howell with reference to that same subject matter after that occasion? A. Yes, sir.

Q. When was that? A. I think that it was on about the 22nd of April.

Q. Who was it saw you on that occasion? A. That was Mr. Porter. I had just left the building, had gone down the street. I saw Mr. Porter drive up and turn in at our place, so I turned around in my car and came back, parked my car, and walked in. When I walked in, I found Mr. Porter sitting in my chair behind my desk, where I had papers [714] and orders and other things that——

Mr. Denit: We object. It is not responsive to the question.

The Court: I beg your pardon?

Mr. Denit: It is not responsive.

The Court: Strictly speaking, your objection is well taken. I will sustain the objection.

By Mr. Leahy:

Q. Did you see Mr. Porter on that occasion? A. I saw Mr. Porter. He was in my office when I walked in.

Q. What was he doing in your office when you walked in? A. Sitting behind my desk in——

Q. What was he doing sitting behind your desk? A. In my chair, just sitting there, I presume. So I said, Excuse me, and sort of intimated that I would like to get him out of that chair, and I sat down. I said, What can I do for you?

Q. What did he reply? A. He said, I have a contract here that I want to leave with you that you may look over, pick to pieces, dissect, do anything you want with it, but it has to be back in zone office signed one week from today, on the 29th.

Q. What month was that? [715] A. That was April, 1952. He then left, left this copy of the contract with all the forms and blank spaces filled in.

Q. How long was he with you on that occasion? A. I would say no more than probably ten to fifteen minutes at the most.

Q. Anybody with him? A. No; he was by himself that day. He didn't have anyone with him.

Q. I will now show you a paper and ask you if you can identify that as the paper which was shown you that day. A. Yes, sir, this is the copy that was left me.

Mr. Leahy: I offer it in evidence, if Your Honor please.

The Court: It may be admitted.

The Deputy Clerk: Plaintiffs' Exhibit 63.

* * *

By Mr. Leahy:

Q. Was anything said with regard to the contract other than what you have stated to us, that it must be signed and back in the zone office by February 29th? A. Yes. When he handed it to me I asked him whether that was, before looking at it and seeing what was on it, [716] whether this was a regular contract or whether this was that three-month contract that he tried to get Mr. Webster to sign.

Q. What did he say to that? A. He said, Well, I have both of them, that this is a regular contract.

Q. I think I said February 29th. I meant to say April 29th. A. April.

Q. Is that right? A. April, yes, sir.

Q. Was anything further said that you can recall at this time? A. I don't believe that there was.

Q. Was anything said as to why or it was necessary that the signed copy be back in the zone office on April 29th? A. No, there was not. It was just given to me to have one week to get it back to the office. That would be the 29th.

* * *

[718] Q. What was the practice of Porter and Howell, both or either of them, with reference to visiting your place

of business during that period of time, from February 1st down through April 21st? A. Well, it was just—they would just drop in. I mean, to see—you wouldn't know they were coming. I mean, they would just drop in.

Q. Was it their practice of supervising and surveying your business and making reports? A. Well, they would make what was known as a "dealer contact." They made those. I don't know what their schedule [719] was on those. I think their business controlled that. But they would drop in, check over what you still had in your inventory, ask how sales were, new and used cars. I understand that after that they would fill out what they called a dealer contact report, which they turned in.

* * *

Q. Now, Mr. French, when was it that you first became in any way connected with the automobile business, in any capacity? A. I started in the automobile business in 1919, right [720] after the first World War.

Q. Did you at any time work for the Zell Motor Company? A. I worked for Zell Motor Car Company in the latter part of '35 and '36, and went with Webster Motor Car Company in March of 1937. I was a salesman for Zell.

Q. At that time in 1937 the Webster Motor Car Company was a subdealer under the Zell Motor Car Company as a distributor, am I right? A. That is correct.

Q. Were you employed as a salesman with Zell Motor Company? A. As a salesman for the Zell Motor Car Company.

Q. Selling Packard cars? A. Selling Packard cars.

Q. Did you continue in that capacity at first with the Webster Motor Company? A. I worked both as a salesman and also as an assistant in the service department when I first went with them in 1937.

Q. Do you recall that there came a time when Mr. Webster became connected with the seafood business? A. Yes, sir.

Q. You recall when that was? A. Sometime in late '44 or early '45.

Q. Do you recall there came a time when you were made the president? [721] A. I was made the president in January of 1946.

Q. Who was the zone manager for Packard at that time? A. Mr. Samuel Braden.

* * *

Q. When was it that the Packard Motor Company came back in what we might call full production for public consumption and sale? [722] A. Well, actually they started giving cars to the dealers in 1946.

Q. In what quantities? A. In very, very small quantities. If I recall correctly, we received about 33 cars that year.

Q. In '47 were they giving them in small quantities still? A. '47 we received small quantities, fifty-some.

Q. When was it, then, would you say that they came back into quantity production? A. Not actually until about the middle of their 1948 run.

Q. Do you recall whether there came a time when there was any difficulty in selling Packards because of any model which the Packard was still putting on the market? A. Well, that came along in 1949 and '50 and '51. It was fairly well cleared up. We made a model in '48 which after such and such a date they automatically became '49s, and then in '50 another chrome strip was added, and they became 1950 models. They were what the general public sort of called the inverted bathtub model rounded. That

was a hard car to sell new, and an exceptionally hard one to sell when you traded it back in as a used one.

Q. Do you recall whether after 1951, or after this model that you say had been about cleaned up, had there been [723] any change in the model of the Packard car? A. Well, our '51 model was an entirely new, redesigned car, streamlined, had public acceptance, was being well accepted by the general public. It was light. In fact, the style for the next year or two afterward sort of copied after it. That car was selling much better, but we had to take back the 1948s, '49s and '50s, which were the unpopular models, and which as I say were hard to sell as used cars.

Q. Now, during this period from '46 on, what have you to say about the Webster Motor Car Company? Was it still in the black? A. To the best of my knowledge we never operated in the red at any time.

Q. And with regard to the prospect for the acceptance of the new models, after '51 and '52 and in '53, what have you to say from your knowledge of the business? A. Well, in '51 we got over most of our difficulties that we had with our '48s, '49s and '50 models, and in '52 the car was essentially the same as in '51, but with some added improvements, a little nicer trim, and it was selling very well. In fact, I think the records of our business will show that the first few months of 1952 we had made more money than we had made the entire year of 1951.

Q. Do you recall now what the prospect was with reference to the neighborhood itself in which your place [724] of business was located? A. Well, we were in one of the fastest growing communities in Baltimore. Right behind our building was Guilford, which was the finest residential section. Just behind that was Homeland, which is the next finest residential section in Baltimore. That

section out there was one of the fastest growing neighborhoods in the nation. And naturally we were getting more people who were in our—in the bracket who were able to purchase cars in the Packard price field. In fact, many of the large department stores had purchased sites such as Hutzler's and Stewart and Hochschild and were putting branches out in the neighborhood beyond us. So we were in a very enviable position as far as new people coming in and new prospects.

* * *

[728] Q. Mr. French, once again I am going to remind you, would you kindly keep your voice up so we can all hear you without difficulty from where I stand? I think yesterday, Mr. French, at the close of the session we were just talking about the neighborhood in which your office was located on York Road, and the general growth thereof. Do you recall going back to 1946 whether the years immediately following 1946, say, 1947, 1948 and 1949, were in any way different from or unusual in the sense that they might be called abnormal business years?

* * *

[729] A. I know of nothing abnormal about them, Mr. Leahy, except that they were years in which we did not receive many new cars. They were years in which you had to buy and sell used cars, and your other activities, to make every dollar, to make money, because you didn't have but very few, as I say, new cars to sell.

Q. Now take the years, the latter part of '49 and '50 and '51, were these abnormal or unusual insofar as Webster Motor Company was concerned from a business standpoint? A. Well, for us they were unusual. We had our

fire which occurred in the latter part of '49, and that left us with only about a third of our building to operate out of. We didn't get into the new building after it was rebuilt until the middle of or a little past the middle of 1950. So for us they were very unusual, very hard and trying times to try to sell our model cars, operate in those cramped quarters, and we had a model then which was not quite as well accepted in its design as it should have been.

Q. Did the fact that that particular model was not so well accepted as you say it should have been reflect itself in any way in the business or the profits of the business of the Webster Motor Company? [730] A. It reflected a lot in that. It meant that there was greater effort, greater expense, to sell the car, and that in taking care of your old customers, you naturally had to make better deals, higher prices to hold that clientele and keep them.

Q. You mentioned about giving higher prices. What have you to say with regard to competition as it existed between the Packard dealers, if it did exist, from '46 down to April, 1952? A. It was always a very vigorous competition. Packard owners like to, like everyone else, and myself, they like to get their dollar's worth and all they can. And even a man who you had sold to a number of times before would say, Frankly I am going to check on your prices, and if you do as good as the other fellow, why, naturally, we will do business. So they would shop other Packard dealers, and you had to meet that competition. If someone else offered more you had to give a little more than that if you wanted to hold that customer.

Q. What have you to say with regard to that kind of competition operating in the sale of parts and also in service to Packard cars? A. Well, it meant also that you had to keep your service organization, your parts organization, right on their toes all the time to meet that competition, and

to [731] hold onto your business and keep your charges as low as possible to them because they expected to pay you no more than they would anywhere else, and sometimes even a little less.

Q. You mentioned your old customers, keeping your old customers satisfied, and so forth. What was the practice of the Packard and also of the Webster Motor Company with respect to old customers? A. Well, we always felt that we did a little more for them than anybody else. We would loan them cars, particularly the professional people, the businessmen, who had to have an automobile. If he came in for service, we would loan him one of our cars. Possibly it might be one of our new car demonstrators. It might be one of our better used cars. The car that was in keeping with the type of car that he owned.

[732] Q. And what effect did that service, or courtesy, have with regard to repeat orders for business of your Webster Motor Car Company? A. We felt it was one of our greatest good will builders that kept people coming back to us and made them happier with the kind of business that we were doing for Packard and for them.

Q. When was it that what we might term as the new model of the Packard came out, with reference to the years following '50 and up to April 1, '52? A. Well, the new model came out which was the '51 model which came out in the latter part of '50. Then in the latter part of '51 the '52 model, which was very similar in design, with some added improvements, dressed up a little more in appearance, and a very fine car. We were very happy about it. Prospects looked better than they ever had and looked like we were going to have many, many years of good business.

Q. And are those the models which you just told us

were acceptable to the public following the poorer model in '49 and '50? A. That is right. The '48s and '49s and '50s were the models that were hard.

Q. What did you anticipate to be the prospects in the year 1952 and the years following after April 1, 1952?

* * *

[733] A. We felt that we could go on for at least as many years in the future as we had in the past, doing a nice, good business, and making a profit.

By Mr. Leahy:

Q. There was introduced—I am not going to take the time of the Court to show it to you again—but there was introduced an edition of the Baltimore Sun, I believe it was, or maybe it was the Towson paper, in which there was some advertising by the Webster Motor Car Company following April 1, 1952. Have you any recollection of what the company had planned with regard to its advertising after April 1, 1952? A. Mr. Webster instructed me to increase our advertising on the back page of the Baltimore Sun.

Q. Did you do so? A. I did.

Q. Over what period of time did you let that [734] advertising? A. Renewed that for an additional six-month period.

Q. At what date? A. After April 1st.

Q. What had the company done with regard to the order of cars from Packard to be sold after April 1, 1952? A. Mr. Webster instructed me to order 20 new cars in addition to the stock we already had. He felt that maybe the difficulty that seemed to be arising, that maybe it was a question that they would like us to buy more automobiles.

and if we would purchase an additional 20 maybe that would help us to straighten matters out with them, and we wouldn't be terminated.

Q. By the way, up to that time had you any intimation at all as to what the difficulty was? A. None. We always understood——

The Court: You have answered the question: stop.

By Mr. Leahy:

Q. On April 1, 1952, and immediately following, and thereafter, the few months, what have you to say with regard to your inventory as it existed at that time, in dollars and cents—a rough estimate; I don't mean you to give down to the last penny. A. As of when?

Q. As of April 1, 1952. [735] A. I would say that it was somewhere in excess of probably $100,000.

Q. And how was that made up? A. That was composed of new cars, used cars, parts, accessories, furniture and fixtures.

Q. Could you tell us what, in your judgment, with the knowledge which you have of the inventory and of the business, whether or not it was a good, business-like proposition for you to make a quick sale of the inventory in closing it out? A. In closing out in a quick sale we would have lost an awful lot of money.

Q. When you say an awful lot of money, could you give us an estimate of what, in your judgment, you would have lost on a quick sale of the inventory which you just told us about? A. I would say figuring from the standpoint of the loss on the new cars and the parts and accessories, that our accounts receivable, accounts, that we might have realized 50 per cent.

Q. Well, did there come a time when it was a matter of consideration and thought on the part of you and Mr. Webster as to how you should conduct the business, in view of the fact that the franchise right had not been renewed? A. We had discussions on that, and we decided that we should continue on, to hold our organization together, to [730] keep going along, working a little harder if necessary, retail this merchandise and try to keep our losses down to the very minimum in our operations.

Q. And how long did you try to keep the losses down in this fashion you have just told us? A. We continued that on through October—or through September—with our franchise, and then in October, 1952 we took on a Nash franchise.

Q. And how long did you continue in the attempt to sell the Nash?

Mr. Denit: We object to that as immaterial.

* * *

[745] The Court: Objection overruled. Read the question.

The Reporter: (reading) "Q. And how long did you continue in the attempt to sell Nash?"

The Witness: Until August 1953.

By Mr. Leahy:

Q. And on that date what occurred with regard to the franchise? A. On that date we closed our doors and let our employees go, and wound up——

The Court: Keep your voice up, Mr. French. Will you repeat your answer, please?

The Witness: In August we gave up our Nash franchise.

The Court: In August of what year?

The Witness: And closed our business.

The Court: In August of what year?

By Mr. Leahy:

Q. What year? A. 1953.

* * *

[747] Q. Do you recall now in this period where you say you were attempting to minimize losses, what happened to the Packard automobiles which you had in your inventory after April 1, 1952? A. We sold those to retail buyers.

Q. And with regard to price, what price did you get from them as compared to the price you got for new Packards prior to April 1, 1952? A. Well, our asking price was the same, but of course we had to make longer deals because it was getting around that we were not authorized Packard dealers, and it made it a little more competitive.

Q. When you say "a longer deal," what do you refer in the automobile business when you use that language? A. Either giving a bigger trade-in value for the car the man has to trade in, or if he has no trade-in, giving a bigger discount of price off the car.

* * *

Cross-Examination by Mr. Denit:

[752] Q. Now, Mr. French, as president of this company, you are of course familiar with the stockholders, officers and directors, aren't you? A. I am.

Q. Who were the officers and directors of the Webster Motor Car Company in 1951? A. Mr. Richard C. Webster, Mr. Donald Webster.

Q. What office did he hold? A. Vice president.

[753] Q. You were president? A. I was president. Mr. Richard C. Webster was chairman of the board. Mr. George L. Graf was treasurer. Mr. Charles Thompson, secretary.

Q. Who were the directors? A. The directors were Mr. Richard C. Webster, Mrs. Webster, Mr. Donald Webster and myself.

Q. Do you know who owned the stock? A. Mr. Richard Webster owned the stock.

Q. Approximately ten hundred shares? A. I don't know the exact amounts.

Q. And so far as you know, he was the sole stockholder? A. He was the sole stockholder.

Q. Who were the officers and directors of the Somerset Seafood Company? A. Mr. Webster and Mr. Graf held office there. That is all I know to my knowledge.

Q. Who were the directors? A. That I do not know.

The Court: Who owned the stock of that company?

The Witness: The Webster Motor Car Company. It was a subsidiary of the Webster Motor Car Company.

The Court: I say, who owned the stock of the company, the Webster Motor Car Company?

The Witness: The Webster Motor Car Company.

[754] The Court: Owned the stock of the Somerset Realty Company?

The Witness: The Somerset Seafood Company.

The Court: The Somerset Seafood Company?

The Witness: Yes.

By Mr. Denit:

Q. There was also another corporation known as the Somerset Realty Company, wasn't there? A. Yes, sir.

Q. That was the landlord of the Webster Motor Car Company, wasn't it? A. That is correct.

Q. Who constituted the Somerset Realty Company? A. You mean, who owned it?

Q. Who were the officers and directors? A. Outside of Mr. Webster, I am not sure. I think that his son, Mr. Donald Webster, I think, had a few shares of stock in it. I think Mrs. Webster had a few shares, and his other son, Doctor Richard Webster, who is a surgeon in Boston, he owned a few shares.

Q. All of the stock then was owned by the Webster family? A. That is correct.

Q. And Mr. Richard Webster was the principal stockholder, wasn't he? [755] A. To the best of my knowledge he was, sir.

The Court: If I may interrupt, I just want to get this clear in my own mind. The Webster Motor Car Company as a corporation didn't own any stock in the Somerset Realty Company?

The Witness: No, sir, it did not.

The Court: But it owned all of the stock of the Somerset Seafood Company?

The Witness: That is correct, Your Honor.

By Mr. Denit:

Q. As president of the Webster Motor Car Company, did you have anything to do with filing its Federal income tax returns? A. Except for signatures, no, sir.

Q. Did you sign them all on behalf of the corporation? A. I imagine I signed all of them. I wouldn't be positive of every year, but I think I did, sir.

The Court: You have photostats?

Mr. Denit: We have photostats.

The Court: I think they speak for themselves.

Mr. Denit: We are going to offer them in evidence, if the Court please.

The Court: I suggest that you point out what the particular item you think is relevant, and what the purpose of it is. I am going to admit the reports.

[756] Mr. Denit: We are not going to read them in their entirety at all.

The Court: No. I think it would be helpful if you indicate the purpose for which you are offering them.

Mr. Denit: I am offering them for the purpose of showing the income upon which the corporation paid its tax for those five years, 1949——

The Court: Is there any specific item?

Mr. Denit: That's one of them, Your Honor. 1949, 1950, 1951, 1952, and 1953, and also for the purpose of showing the salary paid to the president and chairman of the board of directors of the corporation.

The Court: They may be admitted. What was that salary?

Mr. Denit: It varied from year to year.

The Court: What was the range of the salary?

Mr. Denit: Anywhere from $15,000 down to $9,500.

The Court: What do you say was the range of the income shown by these returns? If you don't recall——

Mr. Denit: It is very, very little in the last year.

The Deputy Clerk: Defendants' Exhibits 3, 4, 5, 6 and 7.

* * *

[757] Mr. Denit: In Exhibit No. 3, if Your Honor please, the net income reported for the year was $23,499.33.

The Court: What year was that?

Mr. Denit: 1949. In 1950 the net income reported was $19,151.18. In 1951 the net income reported was $1,821.37. In 1952 the net income was $1,669.11. In 1953 the return shows a net operating loss of $406.85.

The Court: That was for what year?

Mr. Denit: 1953. Now, the returns for some of these years are known as consolidated returns. That is, they included the Somerset Seafood Company as well as the Webster Motor Car Company. Those years are 1949, 1950, and 1953. '51 and '52 are separate [758] returns of the Webster Motor Car Company alone.

The Court: Mr. Denit, I would like to inquire, it is easier for me to ask a question than go through the income tax returns, was the entire salary of Richard Webster charged as an expense item on the income tax returns?

Mr. Denit: Of all of them, yes, sir. And by the appropriate schedule of each return, it is indicated that R. C. Webster, chairman, devoted his full time to the business of the corporation.

The Court: What schedule shows that he devoted his full time, do you recall?

Mr. Denit: It is right in the middle of the return, Your Honor, as you open it. The second page there, where you have your finger, on the other side of the page. (Defendants' Exhibit No. 6)

The Court: No. Where does he state that he devoted his full time?

Mr. Denit: It says right there on the return.

The Court: I thought you said there was a statement that he devoted his full time. The passage you pointed to was just the amount of his salary.

Mr. Denit: "Schedule E, compensation of officers," and under the caption "Time devoted to business," the answer is "Full".

The Court: I see. [759] Thank you.

By Mr. Denit:

Q. Mr. French, who determined the salary you received as president of the Webster Motor Car Company? A. That was determined when I became president that I was to receive so much salary for the year, and that I was to receive 20 per cent of the profits of the automotive business. That was the contract under which I operated.

Q. What was the "so much salary"? A. The salary was $100 a week, and 20 per cent of automotive profits.

The Court: Will you repeat that answer? I didn't catch it.

The Witness: The salary was $100 per week, and 20 per cent of the automotive profits.

By Mr. Denit:

Q. Who determined what salary Richard C. Webster should receive? A. Mr. Richard Webster——

Q. Did he ever discuss it with you? A. Yes. At times we discussed it. For instance, such as the time of the fire I think it was reduced at that time because of the circumstances then.

Q. Was Richard C. Webster's salary deducted from profits in computing your profit-sharing bonus? [760] A. It was part of the business expense, yes.

Q. Did the Webster Motor Car Company maintain any book or record in which Richard Webster's entire salary was not deducted from the profits of the corporation? A. To the best of my knowledge, no. It was questioned sometime——

The Court: You have answered the question.

[761] Q. Now, then, sir, as I understood you, you have been in the automobile business in Baltimore for a long time. A. That is correct, sir.

Q. And in the operation of the Webster Motor Car Company of course you were in competition with cars produced by other manufacturers, weren't you? A. We were.

Q. One of those was the Cadillac, wasn't it? A. Yes.

Q. How many Cadillac dealers were there in Baltimore in 1951? A. I think that there was just the one in '51, as there had always been over the years.

Q. Now, I understood you to say that Mr. Porter and Mr. Howell came to see you on April 16, 1952. Is that correct? A. I believe that was in error. In thinking of the contact report of yesterday I think it was the 18th, Mr. Denit. I said the 16th. I think the contact report showed it was the 18th.

Q. Did you make a memorandum when they came in to see you? A. I did not, sir.

Q. Did you make a memorandum after they left, of their visit? [762] A. I don't recall making one, no sir.

Mr. Denit: This has been stipulated. May we have it identified as an exhibit?

The Deputy Clerk: Defendants' Exhibit No. 8 for identification.

* * *

Mr. Leahy: Will you identify it? What is it about?

Mr. Denit: This is a memorandum in the handwriting of this witness, as to the visit of Mr. Howell and Mr. Porter on April 18, 1952.

By Mr. Denit:

Q. Now, since you testified yesterday, did you examine a copy of that memorandum (handing exhibit to the witness)? A. I don't understand your question, Mr. Denit.

Q. After you testified yesterday, did you see and examine that memorandum? A. This memorandum here (indicating)?

Q. Yes. A. No.

Q. Can you tell us, Mr. French, why you made that memorandum? A. No, sir. If I may read it it may recall it to my mind.

[763] Q. You may read it, of course. A. It has been three years or more, again; I don't recall the memorandum. (After examining): That is my handwriting, sir. I evidently made it, but I had forgotten it.

Q. Will you tell us why you made it? A. No, I wouldn't recall offhand except that possibly because of the circumstances at that time that I thought possibly I should jot down what happened at the time.

Q. Did anybody tell you to make it? A. No, sir, no one told me to make it.

Q. What did you do with the memorandum after you made it? A. I imagine this was probably turned over to

Mr. Webster and in turn to his attorneys along with other business papers.

Q. Did you turn it over to him? A. If it was in my desk I certainly did, sir, along with other papers.

Q. We are trying to find out. Did you or didn't you? A. I don't recall, sir, but I would say I probably did.

Q. Mr. French, do you have a memorandum of any other visit that Mr. Porter and Mr. Howell made to you? A. I don't recall of any, no, sir. [764] There may have been others, but like this, I didn't recall this one.

Q. The last two pages of that memorandum are in the handwriting of Mr. Graf, aren't they? A. I did not look at those; I will look at them now, sir. (After examining exhibit): This looks to be all in my writing.

Q. All in your handwriting? A. Yes, sir.

Q. Was Mr. Graf present at this conference? A. As I testified yesterday, Mr. Graf was there during part of that conference, when I called him in to verify the usual procedure of the contract, either by leaving with us for us to look over, or Mr. Webster and I going to the Washington Zone Office for the signing of it.

Q. Did you ask Mr. Graf to make a memorandum also? A. I don't remember; I may have, sir. Things were very, very upset at that time, and we had a lot of worries and——

Q. What do you mean by "things were upset and you had a lot of worries"? A. Well, it was a question there as to whether we were going to have our Packard contract or whether it was going to be terminated. That was naturally upsetting. We [765] were trying to do business and yet worry along with that. I had been with that organization since 1937 and had worked myself into the place of being head of it. I had worked hard for that, and it was very upsetting.

Q. You, as the president of the organization, wanted a renewal of the contract, didn't you? A. Very definitely. I never thought that we wouldn't get it renewed as long as we continued to be good citizens and do a good job, as we had always done in the past; I thought——

Q. A renewal was tendered to you in the month of June, 1952, wasn't it? A. No, sir, I don't think it was in the month of June. My recollection is that somewhere during the middle of June was the time that Mr. Porter came over and said, Well, we are here to close you out. We want to take back your signs and your special tools, and we are here to finish it up. We would like to get the special tools. I don't know why they wanted those special tools. I suppose they wanted us to stop doing Packard repair business.

Q. Is it your testimony before these jurors today that you didn't know on June 4, 1952, that Packard Motor Car Company wrote a letter to Webster Motor Car Company giving it until June 11th to accept or reject the renewal contract for one [766] year?

Mr. Leahy: I object to the form of the question.

The Court: Objection overruled.

Mr. Leahy: May I object to "Is it your testimony that"?

The Court: I think on cross-examination that is a permissible question. I don't think it would be on direct.

A. Yes, I did know that they had written that letter giving us until I think around the 12th, I think something like that, for the contract to be signed.

By Mr. Denit:

Q. Were you, as president, consulted with reference to whether it should or should not be signed? A. Yes. We

had many consultations on that as to whether we should and just what Packard was going to do, and what was their faith in the matter. Was this just something that was being offered to us as a stop-gap to find some real cause to get rid of us later on? Or was it really genuine? Was it the type of thing that we had always had in the past with Sam Braden as head of the zone? Was it on the level?

Q. What else had you ever gotten in the past that was different from the proposed renewal of your contract? A. Good faith; truthful dealings, sir, which we had not been getting from the members of that zone office from around this time when this started in March.

[767] Q. What had anybody done that you knew was bad faith, in so far as Packard was concerned—that you knew? A. That I knew?

Q. Yes. A. They had misconstrued their meeting with Mr. Webster in the Wicomico Hotel.

Q. You knew that? A. I knew that.

Q. From what Mr. Webster told you? A. No, not only from that—partly—but we had never any idea of ever going out of the Packard business.

Q. But you weren't at the Wicomico Hotel, were you? A. No, sir, I was not.

Q. What you learned about what happened at the Wicomico Hotel you learned from Mr. Richard Webster, didn't you? A. I did.

Q. Do you know anything that any representative of Packard Company did that you thought was injurious to Webster Motor Car Company?

* * *

[768] Q. Did any representative of the Packard Motor Car Company tell you anything that Packard intended to do to injure Webster? A. On about April—well, it would

be the first, [769] April 18th, the time that Mr. Porter and Mr. Howell came to visit us, they didn't tell me that they intended to injure Webster, but the whole conversation and the manner in which it was handled, and the blank papers which they tried to force on me to get my signature on, because they knew I was the president of the company and had previously signed contracts, certainly led me to believe that they were not there to help Webster.

Q. Now, Mr. French, the business transacted on the visit of April 18, 1952, consisted of obtaining your projection sheet, didn't it? A. No, sir. It consisted of a very fast shuffle, if you want to put it in just ordinary words.

Q. Let me ask you——

Mr. Leahy: Let him finish his answer, I submit.

By Mr. Denit:

Q. Weren't you——

Mr. Leahy: I object. Let him finish his answer.

The Court: I think the witness should be permitted to answer questions in his own way and permitted to finish his answer. Have you finished your answer to that question?

The Witness: No, Your Honor.

The Court: You may proceed.

A. (Continuing) These two gentlemen, Mr. Porter and [770] Mr. Howell, came in. Mr. Howell sat there very quietly and had practically nothing to say. Mr. Porter did the talking. First I was given a slip, Harry, this is your sports library renewal for the coming year; it needs renewing shortly, so we want you to sign this. And there is a list of names here, you can take off any you want if you don't

want to mail to them any more, or you can add some on. The sports library, I might say, is a little booklet of sports that was mailed out to a preferred list of customers. I put that off to the left of my desk. Then Mr. Porter brought out the car projection sheet, which we had in evidence here yesterday. He filled that out and he put that pad over for my signature, and I put that off on my left also. He then pulled out this so-called contract which was in evidence yesterday, on the typed or printed sheet, with blank spaces that were not filled in. I asked some questions about that and made some pencilled notations, and wanted to know where the real contract was, I mean that this was just blank pieces of paper. And I started to put that off to my left, when Mr. Porter took it away from me and said, We can't leave it here with you; that is not the procedure. [771] I said, Mr. Porter, it has always been the procedure in the past that Mr. Webster and I go to Washington and sign it over there, or you have brought it to us and we have looked it over and checked on our territory, number of cars, capital needed, and then we have signed it and returned it to the zone, and then we have got our copy back. He said, I never heard of such a thing in my life, not as long as I was with Hudson. I said, Maybe not with Hudson, but that has been Packard's procedure, to handle it in that manner, and I refused to sign any blank papers.

* * *

Q. Mr. French, have you any recollection as to how long this visit of April 18th lasted? A. No, I don't recall, Mr. Denit.

Q. Was it as much as an hour? A. I don't really recall the length of time.

Q. On the occasion of that visit, did Mr. Porter obtain from you the new car projection sheet for April, May,

June, July and August? A. Mr. Porter made out a projection sheet himself.

Q. Is Plaintiffs' Exhibit No. 60 the projection sheet [772] that you saw him make out? A. That is correct, sir.

Q. And he got the information contained on that sheet from you, did he not? A. Part of it is his information and part of it is mine, as to number of cars in stock, what had been sold, what cars we had on hand, and what it looked like our sales would be.

> The Court: Speak up; everybody has to hear you. This is not a private conversation between you and Mr. Denit.

A. (Continuing) Part of the information was to arrive at the stock of cars we had on hand, the number of cars that had been sold and what the outlook is for the coming two or three months on sales of different models. This is broken down into the custom cars and the medium-priced ones and the lower-priced ones.

By Mr. Denit:

Q. In any event, it took a rather considerable time to fill in that sheet, didn't it? A. It takes a little while, yes; not too long.

Q. That indicated to you, did it not, that Packard contemplated you would be buying and selling Packard automobiles at least through August, 1952, didn't it? A. It didn't indicate anything particularly to me, sir. It was procedure that was usual and which their own representative filled out at least once each month.

[773] Q. Would it be usual to obtain a projection sheet from anybody but a Packard dealer? A. As far as I know

I couldn't answer that, sir. I was just a Packard dealer. I don't know.

Q. Well, you knew what the purpose of that sheet was, didn't you? A. Yes.

Q. It was to indicate contemplated sales of new Packard cars, wasn't it? A. It was to give the factory something from their zone office as to the number of cars that that zone would want during the given period so they might base their production on that basis.

Q. It was to be signed by Webster Motor Car Company, wasn't it? A. To be signed by a representative of the Webster Motor Car Company.

Q. And to indicate what the Webster Motor Car Company contemplated it would do as a Packard dealer during those months, wasn't it? A. That is correct.

* * *

[774] Q. Was Mr. Richard Webster in the Packard Motor Car Company office on April 18, 1952? A. He was not, sir.

Q. Was Mr. Donald Webster there? A. He was not.

Q. Then were you the only official of the company on [775] the premises on that date? A. No. Mr. Graf was an official of the company. He was there. Mr. Thompson was there.

* * *

[777] Q. Mr. French, look at the paper which has been marked as Defendants' Exhibit No. 10 and tell us if that is written entirely in your handwriting. A. That is, sir.

Q. And that is an order for how many automobiles? A. That is an order for 16 cars.

Q. And that is dated April 9, 1952? A. That is correct, sir.

Q. When Mr. Porter and Mr. Howell visited you on April 18, 1952, did you say anything to them about having ordered 16 new cars on April 9, 1952? A. I don't recall any conversation in that respect. They would have that in their records.

Q. Now, those cars were actually received by Webster Motor Car Company in the month succeeding April 9, 1952, were they not? A. I don't know whether actually what was ordered was received or not, but substantially they were, sir.

Mr. Denit: Mr. Clerk, will you mark this?

The Deputy Clerk: Defendants' Exhibit No. 11.

The Court: Are you offering it in evidence or for identification?

Mr. Denit: Offering it in evidence, pursuant to the stipulation.

[778] The Court: If you are offering it in evidence the Court has to hear you. You were speaking to the Clerk.

Mr. Denit: I was going to as soon as he marked it so we could identify it by number.

No. 11 is a photostatic copy of the letter of April 9th, with some additional writing on it.

* * *

[779] *By Mr. Denit*:

Q. Now, Mr. French, I show you what purports to be a photostatic copy of your letter of April 9, 1952, with some notations on the left-hand margin of the letter. Are those notations in your handwriting? A. They are, sir.

Q. What do they indicate? A. They indicate the date on which we received these particular cars that are listed here. Other markings indicate, for instance, such as one model which I ordered which I was advised could not be supplied, and which we substituted another model for it.

Q. Does it indicate that all the automobiles that you ordered on April 9, 1952, were actually received by Webster Motor Car Company? A. All of these cars were received, but not exactly as we originally placed the original order for it.

Q. Either these cars or substitutions, isn't that right? A. Or substitutions for them which they could supply.

Q. And in each case the date on which the car was received is indicated opposite the car? [780] A. That's correct.

Q. Now, Mr. Porter called on you on April 22, 1952, did he not? A. He did, sir.

Q. At that time he presented to you a filled-in form for renewing Webster's contract, did he not? A. That is correct.

Q. What did you do? A. He left it with me. I turned it over to Mr. Webster. I think Mr. Webster in turn turned it over to our counsel, Mr. Hughes and Mr. Leahy.

Q. Did you ever advise Mr. Porter that that proposed agreement would not be signed? A. I don't exactly understand that question.

Q. Did you ever tell Mr. Porter that that proposed agreement would not be signed by Webster? A. No, sir, I did not.

Q. Do you know what happened to it after April 22nd? A. I turned it over to Mr. Webster and it was sent to Mr. Hughes and Mr. Leahy, our attorneys here in Washington, whose hands the matter was in.

Q. Did you read it? A. I did.

Q. Did you observe from it that it was a renewal of Webster's contract to March 31, 1953? [781] A. I did, sir, and I also noted——

The Court: Just a moment. Just answer the question.

The Witness: Yes, sir.

By Mr. Denit:

Q. Now, Mr. French, after April 22, 1952, Webster Motor Car Company continued to order parts from Packard pursuant to its dealer contract, didn't it? A. We continued to order parts, and they were supplied to us.

Q. And you continued to receive all of the service that you were accustomed to receive as a dealer, did you not? A. Not entirely, but pretty much so.

Q. You made no complaint about any failure in the service that you were getting from Packard, did you? A. No, we did not.

Q. After April 22, 1952, Webster Motor Car Company continued to use the sign in front of its premises indicating it was a Packard dealer, didn't it? A. We did.

Q. And that continued for how long? A. That continued until after, shortly after June when Mr. Porter came over to close out the deal, and he told us that we should take our signs down. We notified the man who did our sign work, and they were taken down as soon after that as he could get them down.

[782] Q. Were they taken down in July or August? A. I could not answer that, sir.

Q. As a matter of fact, the Webster Motor Car Company received a new Packard car pursuant to its order as a dealer as late as September 2, 1952, didn't it? A. We did a special car.

Q. Have you any idea from the standpoint of dollar volume how many cars Webster ordered from Packard

pursuant to its dealer contract after April 1, 1952? A. That could only be approximated because of the differential.

The Court: What is the approximation?

The Witness: Because of the differential in price of the models. About maybe $40,000 worth.

By Mr. Denit:

Q. Can you approximate the dollar volume of parts that you ordered after April 1, 1952? A. No, I could not.

Q. Was it as much as $50,000? A. I haven't the slightest idea. Our records would show that.

* * *

[783] Q. Now, Mr. French, isn't it a fact that during the month of May, 1952 Webster Motor Car Company ordered new Packard cars from the Packard Company? A. We may have. I don't know. Do you have anything to refresh my memory on that?

The Court: Cut this short. Can't we stipulate as to how many cars were ordered after the 1st of April, '52 and on what dates? I should think that that's a matter of record.

Mr. Leahy: I am perfectly agreeable to doing it, Your Honor.

The Court: Do you have such a list?

Mr. Denit: We have a memorandum of the number of cars and the dollar volume involved.

[784] The Court: Suppose you show it to Mr. Leahy and see if that can't be stipulated. That will shorten the cross-examination.

Mr. Leahy: If you say that's it, that's enough. I don't need to see it, Mr. Denit. I take your word for it.

Mr. Denit: The records indicate that in the month of April there were 19 new cars, and the dollar volume was $43,340.66. In the month of May there were 20 new cars. The dollar volume was $47,039. In the month of June there were three cars, the dollar volume was $8,575. With respect to parts, the records indicate that parts were purchased in April aggregating $2,004. In May, aggregating $4,478. In June, approximately $450.

* * *

[785] *Redirect Examination by Mr. Leahy*:

Q. Mr. French, you were asked and shown with reference to Exhibits 10 and 11, Exhibit 10 was your letter which you identified as April 9, 1952, entering an order for 16 cars, and Exhibit 11 was a photostatic copy of the same letter with certain annotations along the edge made which you indicated substitutions or changes in the order. Do you recall those two? A. I do, sir.

Q. Is that the order for the 16 cars which you referred to in your testimony earlier this morning where you ordered cars in April because you didn't know what the difficulty was and thought that perhaps if you ordered more cars that would solve the difficulty? [786] A. That is correct, sir. We only ordered 16 instead of 20 as Mr. Webster ordered me because they could not supply us anything in a coupe model, which that paper also shows the notation "No 95s, no 65s." That is a symbol number designating a coupe.

Q. That is the order which you made in pursuance to the instructions from Mr. Webster for the 20 new cars ordered hoping to clear up the difficulty? A. That is correct, sir.

Q. You were about to answer something with regard to the renewal contract to which your attention was called on the 22nd day of April when Mr. Porter and Mr. Howell came to you the second time. Did you notice anything different about that renewal contract from the contract it renewed? A. That contract had all of the places in which what we call blank spaces which had been typed in and filled out and covered territory, number of new cars, amount of capital needed. In other words, it was filled in completely. And also it was dated as of April 1, 1952, and not as of June when it was tendered.

Q. Had you at that time any information from Mr. Porter or Mr. Howell that they had been down to Deal Island on April 3rd? A. Yes. They had told me that they had been down there, and that this was a regular contract, and not the one [787] that they had offered Mr. Webster for three months' time down at Deal Island, but they also had that one if I wanted that one.

Q. Did they tell you why the sudden change from a renewal offer of three months to a date March 31, 1953? A. No, they did not.

Q. Did they give you any information as to why the change was made? A. Actually they gave me no information on that, nor any reason for the change whatsoever.

[788] Q. Now, did you have any contract whatsoever after March 31, 1952, under which you bought any cars or parts from Packard? A. We did not, sir.

Q. You continued to order the same as you had when you had a contract, is that it? A. That is correct.

* * *

Q. Had you executed and signed for and on behalf of the Webster Motor Car Company any written contract

with regard to the sale of automobiles or parts after March 31, 1952? A. No, sir.

Q. And other than the one on April 18th, and the renewal of April 22nd, had any been offered to you by Packard? A. They had not.

[789] Q. You said, I think, that you turned that contract over to Mr. Webster? A. That is correct, sir.

Q. And that he in turn, so far as you knew, turned it over to counsel for the Webster Motor Company? A. That is correct.

Q. Were you in on any conference with reference to that contract at any time thereafter at which any of the Packard representatives were present? A. No, sir; I was not.

* * *

[790] Q. Do you recall whether at the conference on either April 18 or April 22, when Mr. Porter asked you to sign either one of those two instruments presented to you, that he, Porter, said Packard would sign if you did? A. He did not.

Q. Was any assurance given you in that regard? A. None whatsoever.

* * *

[792] Q. Now, you said something about a special car in September. Will you tell us what that special car was, which was ordered from Packard in September, 1952? A. We had a Packard owner, a lady who had been driving Packard for many, many years, gave us an order for a 400 sedan with an overdrive transmission, which was not the usual type. They came with an automatic transmission. It was a question as to whether it could be supplied or not. And the factory accepted that order through the zone. Then the question came up later as to whether we would

receive the car or not. [793] And I told Mr. Wilson, I believe it was who was car production manager at that time, that it was an old Packard owner, and unless they got this car they would naturally go and buy Cadillac or something like that. The car was supplied to us and we did deliver it to Mrs. Witridge at the time it was received.

Q. What was the date of the order of the car, if you can recall? A. If I recall correctly, sir, it was ordered a day or two after Mr. Porter had been over to close out the deal in June.

* * *

Q. Do you recall any instructions given at any time to your counsel with regard to getting certain assurances from Packard? A. I do.

Q. Do you know that of your own personal knowledge? A. Yes, sir.

Q. Would you, as president of the motor car company, [794] Webster Motor Car Company, have executed the contract of renewal left with you on April 22nd if you had got assurances that that contract had been left with you in good faith by Packard?

Mr. Denit: We object.
The Court: Objection sustained.

* * *

Recross Examination by Mr. Denit:

Q. Mr. French, you referred to Mr. Howell being [795] present at a conference at Deal Island. Are you correct about that? A. I don't recall saying that Mr. Howell was at Deal Island. I might have slipped up on the name, sir.

Q. You don't claim, sir, do you, that Mr. Howell was present at any conference at Deal Island? A. No, and I don't recall having said it, sir.

* * *

JAMES M. FINCHAM was called as a witness by the plaintiffs, and being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Leahy:

Q. Mr. Fincham, I am going to ask you please to keep your voice up so that the ladies and gentleman of the jury and His Honor and we here can hear you without difficulty. Would you state your full name for the record, please, Mr. Fincham? A. James M. Fincham, F-i-n-c-h-a-m.

Q. And where do you reside, Mr. Fincham? A. In Baltimore, Maryland.

* * *

[796] Q. And what is your profession? A. I am a certified public accountant.

Q. And how long have you been such? A. I passed the Maryland State examination in 1940, and opened my own office in 1941, and have practiced ever since.

Q. And where is your office located? A. 928 Cathedral Street, Baltimore.

Q. And prior to that time what was your training for your profession? A. From 1935 until 1941 I was senior staff accountant with Ernst and Ernst, a national firm of public accountants. From 1929 until 1935 I traveled as an auditor.

The Court: Will the witness' qualifications be conceded?

Mr. Denit: Yes.
The Court: Very well.
Mr. Leahy: Thank you.

By Mr. Leahy:

Q. Are you acquainted with the Webster Motor Company? A. I am, sir, yes.

Q. Have you ever been employed by the Webster Motor Company? A. In a professional capacity.

Q. To do what? [797] A. To audit their books and records; to express opinons on their financial statements prepared under audit, and to prepare their tax returns.

Q. When was it you were first employed by Webster Motor Company? A. 1949, sir.

Q. And at that time you were employed to do what? A. In 1949 we prepared the 1948 corporate income tax return for the Webster Motor Car Company and its subsidiaries.

The Court: Keep your voice up. Suppose you start the answer over again. You let your voice go down and we can't hear you.

The Witness: Sorry, sir. In 1949 we prepared the 1948 corporation income tax return for Webster Motor Car Company and its subsidiaries. Thereafter we performed annual audits in addition to preparing the income tax returns.

By Mr. Leahy:

Q. Audits of what? A. Audits of the corporate records of the Webster Motor Car Company and its subsidiaries.

Q. When you refer to the subsidiaries, to what companies, if you do refer to them, do you refer? A. The

Somerset Seafood Company, a wholly owned subsidiary of the Webster Motor Car Company, and at one time the [798] Tangier Sound Seafood Company, a wholly owned subsidiary of Somerset Seafood Company.

Q. And have you been employed with reference to the particular lawsuit which is being tried here today in any capacity whatsoever by the Webster Motor Company? A. Yes, sir, we have.

Q. What was your employment by the Webster Motor Company in that regard? A. To determine the automotive losses or profits during certain period of the Webster Motor Car Company's life.

[799] Q. And did you undertake to determine the automotive losses or profits during a certain period, in accordance with that employment? A. Yes, sir, we did.

Q. And in doing so what books, records, papers or instruments did you examine of the Webster Motor Company in order to come to your conclusion, if you came to a conclusion? A. We examined whatever books of original entry that we needed, plus the general ledger of the company; copies of reports sent to the Packard Motor Car Company annually by the Webster Motor Car Company in prior years; the corporate income tax returns, and also Mr. Webster's personal tax returns.

Q. Did you personally examine those records in order to make up your schedules of losses or profits by the Webster Motor Company? A. I did, sir, yes.

Q. Over what period of time were you employed to make that determination as to losses and profits? What years? A. I don't quite understand—what years were we supposed to examine?

Q. That's right. A. We examined from 1946, I believe it was, or 1947, through 1953.

Q. And with reference to each of those years, did you [800] examine the records, books, papers, and so forth, which you have just told us you examined? A. Yes, sir, I did.

Q. What familiarity had you with those books and records even before your employment to make the determination of profits and losses? A. Well, annually from 1949, '50, '51, '52, '53 and '54, we had previously audited those records.

The Court: I think you have laid sufficient foundation.

By Mr. Leahy:

Q. Did you make any report to the Webster Motor Company with regard to the services which you had performed in determining whether the losses or gain, profits or losses, were made by the Webster Motor Company over those years in question? A. Yes, sir. We prepared schedules as appearing in your memorandum of law here.

Mr. Leahy: I am now referring, if Your Honor please, to a memorandum which we have supplied to the Packard Company and also to the Court. May I use that?

The Court: Yes, indeed.

By Mr. Leahy:

Q. You are familiar with this, are you not, which I hold in my hand, and which is a report containing certain [801] schedules? A. Yes.

Q. I will ask you now to turn to page 56.

The Court: I want to ask counsel to come to the bench, please.

(At the bench:)

The Court: Does this question of the method by which Mr. Webster's salary should be treated come into this calculation?

Mr. Leahy: It does, yes.

The Court: I think that perhaps it might be profitable for me to rule on it now instead of at the end of a long line of testimony and then exclude some testimony. I read the memorandum, Mr. Leahy, that you submitted yesterday afternoon. Here is the way the situation presents itself to me. The other day Mr. Donald Webster made a statement that it is proper to charge 20 per cent of the salary as expense, and 80 per cent as profit, because that was the way in which Mr. Webster took his profit out of the company. That was my understanding. Well, I gave some thought to that overnight, and the matter appeared to me to be rather serious, because if Mr. Donald Webster's contention is correct—and I am not sure that it is—there is something wrong with the income [802] tax returns, because that salary was charged as an expense in the income tax returns, and now Mr. Donald Webster says 80 per cent of it was profits, and that is a rather serious matter. They might have to retain you in a tax case. Now, the memorandum which you submitted yesterday changes the approach entirely and doesn't claim that any part of this was profit, but claims that it is compensation for Mr. Webster's services in respect to three different enterprises, only one of which was the Webster Motor Car Company. Well, I think perhaps that is a more palatable approach because it doesn't involve the serious potentialities that the other one does. But here is what I want to know in this connection. Your memorandum seeks to divide that salary among three enterprises: Webster

Motor Car Company; the Somerset Seafood Company, and some stock investment activities. It appeared in Mr. French's cross-examination that the Webster Motor Car Company was the sole stockholder of the Somerset Seafood Company. Therefore I can see your contention so far as the Somerset Seafood Company is concerned, but who owned all these stocks which were being invested and reinvested?

Mr. Leahy: Webster Motor Company.

The Court: They were not Mr. Webster's personally?

[803] Mr. Leahy: Oh, no, no.

The Court: I just wanted to clarify this in my own mind before this testimony proceeds. Now, what is your contention going to be? You have abandoned, or you haven't pursued any way, the contention made by Mr. Donald Webster.

Mr. Leahy: He used the word "profits." What we did was this: The Webster Motor Car Company had several activities other than the motor car company, the seafood company, and also this investment company. As a matter of fact, he spent 20 per cent of his time on the motor activities. He took, however, the motor activities and had charged on its books the full amount of salary which Mr. Webster claimed not only for his motor car services but also for the seafood company and the investment company. What we did was to charge back as expense to the company all of the salary which had been paid to Mr. Webster, and then we just charged to the motor end of the business that proportion apportioning the salary to the motor company, and of course the income tax returns were

consolidated returns, except for one year, and they were prepared by this witness, who can explain all of them.

The Court: In other words, is it your contention that $15,000 salary covered a salary for three different [804] activities?

Mr. Leahy: That is it.

The Court: I see. Because, frankly, on Mr. Donald Webster's statements I had been reflecting in my own mind as to what the Court's duty was when a taxpayer comes in and says that what he charged off as an expense of salary was really the profit account.

Mr. Leahy: No, it wasn't profit.

The Court: I was wondering whether it was my duty to transmit the record to the Department of Justice.

Mr. Webster: May I say one thing? I think my statement the other day was inarticulate, and I apologize.

The Court: No, it was not ambiguous, Mr. Donald Webster.

Mr. Webster: May I say one further thing, that I have here in court a statement from the Bureau of Internal Revenue that they have audited our returns through 1950 and found them satisfactory?

The Court: They may be satisfactory, but you tried to deviate from your income tax returns. You tried to orally contradict them, and that was a very serious matter, Mr. Webster.

Mr. Leahy: This matter doesn't show that way at all.

The Court: Very well. Proceed, then.

[805] (In open court:)

By Mr. Leahy:

Q. Mr. Fincham, do you have a copy of this same small volume which I am holding in my right hand? A. I have, sir; yes.

Q. I am going to ask you to turn to page 56 in that volume, and I will ask you if you will kindly look at pages 56 through 64, and there do you see certain schedules which are identified by number? A. Yes, sir, I do.

Q. Who prepared those schedules? A. I did, sir.

Q. And they were prepared in the manner which you just told the ladies and gentleman of the jury? A. Yes, sir.

Q. The first schedule, without going into any detail on it, is identified as having been made up for what purpose? A. The first schedule? The one appearing on page 56, sir?

Q. Yes. A. That is a summary of the losses and damages claimed by the Webster Motor Car Company.

Q. Over what period of time? A. The various factors in there have been based on different periods of time as to the recovery of estimated [806] profits based on the average annual earnings of the corporation for a certain number of years. This schedule sets forth recovery based on seven and three-quarter years extended through fifteen years with regard to profit.

Q. Do you recall where you got the term seven and three-quarter years? A. The seven and three-quarter-year period, sir, is the period of the remaining life of the lease held by the Webster Motor Car Company on its operating place of business at the date the franchise was discontinued.

[807] Q. Will you pass to what is identified by number Schedule I, on page 57, and will you tell us why you made that schedule? A. This schedule, sir, sets forth the amount of loss sustained by the automotive operation of the Webster Motor Car Company during the period from

April 1, 1952 to December 31, 1953. That is the period immediately subsequent to the cancellation of its Packard franchise, and during which period of time it was endeavoring to operate.

Q. Going to Schedule 1-A, on page 58, will you explain the purpose for which that was compiled? A. This schedule on page 58 is the over-all operations of the entire Webster Motor Car Company's operations from April 1, 1952 to April 1, 1953.

Q. You mean April 1st, did you say? A. April 1, '52 to December 31, 1953. The over-all operations of all of their activities.

Q. Now, Schedule II, on page 59, what purpose is shown by that schedule or intended to be shown? A. The purpose of Schedule II which relates to the period from April 1, 1952 to December 31, 1953, is to apportion to that period and to the automotive part of the operations of Webster Motor Car Company what is considered to be a fair and equitable charge, operating wise, for Mr. Webster's personal services rendered by him during that period.

[808] Q. Now when you come to Schedule III on page 60, what was that compiled to show? A. This was prepared to show the actual loss suffered by the Webster Motor Car Company in the disposition of the furniture and equipment which it had on hand on December 31st, and had not disposed of prior to that date. This particular equipment was disposed of in 1954, and this reflects the loss sustained at that time in getting rid of all of its equipment.

Q. In Schedule IV of page 61, what does that schedule show? A The schedule here sets forth the amount of the leasehold improvements which had not been recovered through charges to operations at the date of the cancellation of the Packard franchise and subsequently carried

through to December 31, 1953. The schedule as presented here incidentally, sir, has a $900 change required in it.

Q. We will come to that in just a moment. A. Yes.

Q. Schedule V, what was the purpose intended to be shown in that schedule? A. Schedule V sets forth the profits of the Webster Motor Car Company, from all of its operations for the period starting in 1946 and running through the three months of 1952. That is, through March 31st of 1952. It takes the profit [809] shown by the books and records of the company, and we have made certain adjustments to those profits in order to bring forth the profits or losses which were sustained in the automotive operations alone.

Q. I see. Take Schedule VI, on page 63. A. Schedule VI relates to the period from 1946, January 1, 1946 through March 31, 1952, and again apportions the fair and equitable charge to the operations of the automotive enterprise of the Webster Motor Car Company for Mr. Webster's time and personal services.

Q. And the last Schedule VII on page 64. A. Schedule VII on page 64 sets forth the over-all operating figures of all of the Webster Motor Car Company's operations from the period of January 1, 1946 to March 31, 1952, and shows the profit as it appears on their books, which profit was subsequently adjusted in Schedule V appearing on page 62.

The Court: I don't understand the difference between Schedule V and Schedule VII. Will you explain that, please?

The Witness: Yes, sir. If you will take Schedule VII, the extreme righthand column, "Profits before taxes on income," they are the figures which become the first line of figures in Schedule V.

[810] The Court: I see. You have answered it.
The Witness: The profit——
The Court: You have answered my question.
Mr. Leahy: Is that clear, Your Honor?
The Court: Yes, indeed. He has answered the question.

By Mr. Leahy:

Q. Now, there is one question I want to ask. Turn to page 61, Schedule IV. That is entitled the "Unrecovered cost of leasehold improvements," and you explained to the jury what you meant by that. Would you tell us what items in the books indicate any leasehold improvements, the cost thereof, how that cost was incurred, and how any loss has been deducted in accordance with this schedule as shown on the books? A. Yes, sir. I have forgotten the date on which the Webster Motor Car Company leased its existing property. Apparently it was leased along about January 1, 1950. The Webster Motor Car Company leased its existing building, the building at that time, and the land on which it is situated was not owned by the Webster Motor Car Company. The building was a burned out shell. It had to be completely rebuilt. After leasing the premises in the condition in which they were, the Webster Motor Car Company rebuilt the building. They re-roofed it, rebuilt it entirely, no floors, new showroom, whatever was necessary, heating plant and so forth, to place [811] the burned out building in operation. Now having done that, it did not own those premises as such. It had no title to them. It merely had the right to use those improvements for the unexpired portion of its lease, which lease was for a period of 10 years. The improvements, the cost of the improvements, contractors'

bills, supplies, materials, and so forth, totalled $35,999.76, paid in cash by the Webster Motor Car Company. Having the right to use those improvements for 10 years, it is normal accounting procedure then that that right be amortized over the 10 year life, so that each year one tenth of that $35,000 would be charged to operations, almost as though you would pay rent, although it would be no actual payment. They had already made it. So that at December 31st, or at March 31, 1952, at the time this franchise was cancelled, the Webster Motor Car Company had charged off $6,700 of these leasehold improvements to their operations, and reduced their operating profits during that intervening period by $6,700. At March 31, 1952, they had $29,236.39 still to be recovered through operations. In continuing their business from March 31, 1952 to December 31, 1953, there was an additional $6,287.47 charged as operating expense through that next 17 or 18 months, 21 months. At December 31, 1953, when they finally discontinued [812] operations completely, these figures indicate there was $22,948.99 unrecovered. There is in the figures, however, at this point, a discrepancy of $900 in that in 1953, by reason of faulty construction in 1950, they recovered $900 from one of their contractors, and that amount has to be applied against this schedule.

Q. So that would make the schedule instead of $22,948, it would be $22,048? A. $22,048.99.

Q. Because of the recovery in 1953? A. That's correct.

* * *

[813] Q. Mr. Fincham, I think just at the noon recess we finished up explaining Schedule IV with regard to unrecovered cost of leasehold improvements at December 31, 1953, and I believe you corrected the item to read $22,048.99? A. That's correct, sir.

Q. Would you return to Schedule VII on page 64 and in connection with that also Schedule V on page 62? Now, I think you told us that the last column of figures, "Profit before taxes on income," appeared as the first line of figures on Schedule V, page 62. Is that right? A. Yes, sir.

Q. From what source did you get on Schedule VII the first column of figures as to net sales, and what does that column refer to? A. That figure was obtained either from the general ledger of the company or from our audit reports for the [814] years in question.

Q. I think you told us that you had examined the books of the company, and I think you mentioned also certain reports which were sent to Packard Company. What reports do you refer to? A. The accounting department of the Webster Motor Car Company each month submitted to the Packard Motor Car Company a statement setting forth their sales and income and expenses for that month, and for that year cumulative to the date ending with that month. That was sent to Packard each month. At the end of December one was sent for the twelve-month period each year.

Q. So that these figures appearing on the first column to the left on Schedule VII were figures, were they, which had been already reported to the Packard Motor Company? A. In effect, yes, sir.

Q. And the grand total there is the grand total of the net automobile sales? A. That is correct, sir.

Q. There are no sales now of the seafood company in there? A. No, sir.

Q. And they amount—am I reading the figure accurately—three million——

Mr. Denit: Just a moment. If the Court please, we [815] don't think the contents of these schedules

should be offered into evidence until it is determined whether the schedules themselves are admissible.

The Court: Counsel is about to ask a question. I will pass on the admissibility of the question after the question is finished.

Mr. Leahy: I will put the question this way, if the Court please:

By Mr. Leahy:

Q. Would you tell us what the total of net sales from the year 1946 down to the 31st day of March, 19—or is it April 1, 1952, or is that through the entire year of 1952? A. March 31, 1952.

Q. March 31, 1952. Would you kindly tell us what that total is?

Mr. Denit: May we approach the bench on that, if the Court please? We object to the question.

The Court: There is nothing before the Court.

Mr. Denit: We object to the question.

The Court: On what ground?

Mr. Denit: No. 1, it seeks to get into evidence the contents of these schedules which haven't been offered in evidence, and on our theory the schedules are calculated on a theory which is not tenable so far as this plaintiff is concerned.

[816] The Court: You may come to the bench.

(At the bench:)

The Court: Mr. Leahy, are you going to offer the schedule in evidence?

Mr. Leahy: I was going to offer the schedule after I had some further questions.

The Court: I think technically the objection is well taken because it calls for the contents of a written instrument which isn't in evidence. I will have to sustain the objection on that ground.

Mr. Leahy: Could I offer in evidence the schedule?

The Court: Are you offering all of the schedules or this one?

Mr. Leahy: I am just going to offer this one first.

Mr. Denit: We object to it.

The Court: On what ground?

Mr. Smith: We have objection, Your Honor, to all of these schedules, and I would be glad to state them on the record now.

The Court: Yes. No, I don't like to do that. I only pass on the one thing that is before me. So suppose you confine your objection to this particular exhibit.

Mr. Smith: Which exhibit is it?

Mr. Barker: VII.

Mr. Leahy: The last page, Mr. Smith.

[817] Mr. Smith: Your Honor, our objections are: First, we object to each of the items of damages in the schedules, and to all figures and computations on which they are based. Second——

The Court: I am going to overrule that objection because all I am going to consider is the admissibility of this particular schedule. I shall rule later on at the proper time as to whether that constitutes a proper measure of damages. That can be done by request for instructions.

Mr. Smith: Second, there is no legal theory on which this schedule, or any item in it, can be re-

covered. Third, the computations employed in this schedule are not supported by the books or records. Fourth, the evidence is conjectural, speculative and subjective. Five, profit for the years 1946, 1947, 1948 and 1949 are not a proper basis for computation of anticipated profits because those years were abnormal years in the automobile business, and in Webster's business, and Webster's profits during those years therefore are irrelevant, immaterial and incompetent. Six, profits for the first quarter of 1952 are not a proper basis for computation of anticipated profits because they are for only a portion of the year. Seven, anticipated profits are not recoverable for [818] any period after April 18, 1952, the date on which a one-year renewal was offered Webster. Nine, anticipated——

The Court: How many have you got?

Mr. Smith: Sixteen.

The Court: Oh, no, I am not going to listen to sixteen objections.

Mr. Smith: Your Honor, I think I am entitled to have our objections on the record.

The Court: You are. May I read them and then we will give them to the reporter to copy into the record?

Mr. Smith: Yes, Your Honor.

The Court: I don't hear long argument on objections.

Mr. Smith: I am not arguing, Your Honor. I am stating my objections on the record.

(A typewritten sheet of objections was handed to the Court.)

The Court: In order to protect the record, I am going to ask the reporter to copy these objections into the record, if you wish. But my view is that most of these objections go either to the probative value—rather than the admissibility—I concede that you can argue the probative value—and some of the questions go to the question of substantive law as to whether this is conjectural, for example, and as to whether anticipated profits are a proper [819] method of damages. I am not going to decide that on the question of admissibility of evidence. There is one objection, however, that you have that I think does go to admissibility. You had some objection to the fact that the books are not produced. Where is that?

Mr. Smith: The objection—we do not make a general objection, Your Honor, on the basis that the books are not produced, but we do object to computations employed in the schedules, because the computations are not supported by the books.

The Court: Here is what I am going to do. There is something to that objection. Of course, the federal rule is that accountant's summaries of complicated accounts are admissible in evidence. However, there must be available to the other side the original records which these summaries purport to summarize. Therefore, I think that the accountant should produce his working papers.

Mr. Leahy: We have them, Your Honor.

The Court: I think they should be marked for identification and made available to the other side for inspection.

Mr. Smith: I want to make it clear, Your Honor, we are not objecting that they do not take

their original figures, such as profit for the year, from the books. Our [820] objection is that certain computations—and to illustrate, this apportionment of Richard's salary is not supported by the records.

The Court: Mr. Smith, I don't think that goes to admissibility. I think that goes to the probative value of the testimony. It is like objecting to testimony on the ground that it isn't correct. That isn't a basis for excluding testimony. That's a basis for your disputing its being considered. Specifically, what items do you claim are not supported?

Mr. Smith: I am not sure, Your Honor, whether these computations in this schedule are the kind to which we object. Schedule VI, however, would be.

The Court: We are on Schedule VII now.

Mr. Smith: I know, Your Honor.

The Court: I always like to pass on the admissibility of a specific item of evidence that is before the Court. I don't like to pass on a broader territory than is before me.

Mr. Smith: We have all these objections, Your Honor. I think it would save time if Your Honor would let me read in these objections as our objection to all of these schedules so that I don't have to repeat them each time.

The Court: Are the objections the same to all schedules?

Mr. Smith: Most of these objections are objections [821] to all of the schedules.

The Court: Under those circumstances, finish your objections.

Mr. Smith: Most of them are—they don't all relate to all the schedules. I prepared objections——

The Court: I have to know what objections are interposed to any particular schedule. You can't put me in the position of handing up 16 objections and say that some apply to one schedule and some to another.

Mr. Smith: Mr. Leahy proposes to offer all these schedules, I presume.

The Court: He is offering them one at a time, and I would like to pass on them one at a time.

Mr. Smith: I respectfully suggest that we would save time if I am allowed to state my objections to all of the schedules, and then not have to repeat them each time because——

The Court: Do you want to offer all of them?

Mr. Leahy: I will offer them all at this time.

The Court: Very well. State all your objections, and perhaps this will shorten matters.

Mr. Smith: The objections which I have heretofore stated on the record are deemed to be stated as objections to all of the schedules which Mr. Leahy proposes to offer. Eight, anticipated profits are not recoverable for any period after February 13, 1953, the date of the commencement of this action. [822] Nine, anticipated profits are not recoverable for any period after March 31, 1953, the date on which a one year renewal would have expired. Ten, no part of the salary paid to Richard C. Webster can be added to book profit. Eleven, transportation furnished Richard C. Webster cannot be added to book profits. Twelve, social security and insurance for

Richard C. Webster cannot be added to book profits. Thirteen, other personal services for Richard C. Webster cannot be added to book profits. Fourteen, recovery of the amount paid George S. May Co. cannot be added to book profits for 1951. Fifteen, unrecovered cost of leasehold improvements at December 31, 1953 is not recoverable. Sixteen, loss on furniture and equipment not recoverable. Seventeen, loss in the Nash dealership is not recoverable.

The Court: Now many of these objections are directed to probative value of particular portions of this schedule rather than their admissibility. Some of these objections relate to whether particular items are correctly treated. It is the Court's view that whether a particular item is correctly treated from an accounting or other standpoint [823] is not a matter affecting admissibility of the document. The Court is willing to rule on that at the proper time in the proper way. Now so far as the admissibility of the schedule is concerned, the rule of evidence prevailing in the Federal Courts is in connection with complicated accounts that a summary made by a qualified accountant is admissible in evidence, subject, however, to the proviso that opposing counsel is entitled to inspect the working papers of the accountant, and the original books from which the entries were taken. And on request of defense counsel I shall direct the production of the working papers. We will have them marked for identification and will direct that they be made available for inspection of defense counsel. I am willing to make a similar direction upon request of Defense counsel with respect to the books and records of the Plaintiff.

Subject to this qualification the objections are overruled, and the schedules are admitted in evidence. Suppose you give one copy to the clerk so that he can mark them.

* * *

[825] Q. Mr. Fincham, I believe you told us that this column to the extreme left in Schedule VII, on page 64, was a column which you compiled from certain books, records, and so forth, which include your work sheets; is that right? A. That is correct, yes, sir.

Q. Do you have your work sheets with you now? A. Yes, I have.

Q. Where are they? A. In the witness room.

Mr. Leahy: Would someone go to the witness room and get them?

By Mr. Leahy:

Q. What other records did you rely upon in the compilation of this particular column? A. The original entry records of the company, their purchase records, their sales records, their transfer journals and their general ledger.

Q. Where are those books, if you know? A. They are all here in the witness room, to the best of my knowledge, sir.

Q. I think you said something about some records or reports that went to the Packard Company. [826] A. Yes, sir. Each month a record of the business that had been done for that month, balance sheet showing the financial condition of the company at the end of that month, and cumulative sales and income and expense were submitted to the company.

The Court: Suppose you go slower. You are talking in accounting terms. You are talking to people who are not accountants—certainly the Court doesn't understand; I don't know whether the jurors do or not, but the Court doesn't understand accounting.

By Mr. Leahy:

Q. Are those records here also? A. Yes, sir, they are——

The Court: Answer the questions. We are not interested in instructions in accounting at this point, interesting as it would be.

By Mr. Leahy:

Q. You tender those, do you, at this time? A. Yes, sir.

* * *

[827] Q. Will you please tell us in gross total on page 64, the net sales of the Webster Motor Car Company from January 1, 1946, to March 31, 1952? A. $3,684,083.22.

Q. On the column in which you say "Cost of goods sold" there appears as a gross total $2,885,875.45. What costs are included in that column? A. The cost of merchandise, that is cars, both new and used; of parts; of accessories; of labor being supplied, that is being sold with accessories or with repairs of automobiles, or reconditioning used cars. Anything that might be termed a direct cost applying to the product being sold.

Q. And you finally, in the right-hand column, arrive at what you call "Profit before taxes on income" in the amount of $174,683.68. You carry that over, do you not, into Schedule V on page 62? A. Yes, I do.

Q. And there in accordance with the year, including '46 and '52, the first three months down to April 1, 1952, there appears underneath each year the profit per books. Those are the books you referred to that you just told us about? A. That is correct, sir.

Q. And in 1946 the profit was $42,826.87. [828] In 1947 the profit was $32,444.55. In 1948 the profit was $69,423.43. In 1949 the profit was $16,805.15. In 1950 the profit was $9,737.11. In 1951 the profit was $1,844.12. In 1952, for the first three months, the profit was $1,582.45; which brings up the total we just mentioned to the jury of $174,000-plus. Is that right? A. That is correct, sir.

Q. Before you arrived at those profit figures against each of those years, had you or had you not taken into account the salaries paid the officers of the company? A. We had taken into account all expenses of any nature at all paid by the Webster Motor Car Company in full.

Q. In full? A. Completely.

Q. Did that include Mr. Webster's salary in full? A. That included Mr. Webster's salary in full.

By The Court:

Q. In other words, you deducted his full salary as an expense item? A. Yes, sir, that is right.

By Mr. Leahy:

Q. Now, then, you, in this schedule, make certain [829] adjustments, do you not? A. Yes, sir.

Q. What adjustment did you make with reference to Mr. Webster's salary? A. We make two adjustments for the purpose of determining the automotive profit, or the profit in our opinion which was directed toward automotive operations alone.

Q. Would you stop there for just a moment? Why do you say "automotive operations alone," with reference to the Webster Motor Company? A. The Webster Motor Car Company was actually engaged in three different types of operation. They were conducting an automobile sales and service agency. They were dealing fairly extensively in the purchase and sale of stocks and bonds; and they were very heavily financially interested in the Somerset Seafood Company, which is an oyster packing house in Deal Island, Maryland, and to which operation Mr. Webster devoted the major part of his time. Mr. Webster also devoted his time to buying and selling securities. During the period 1946 through this period 1952 Mr. Harry L. French was acting as president of the Webster Motor Company, managing its automotive operations, with a very small amount of assistance from Mr. Webster. We therefore wanted, in view of the three types of [830] operations, to obtain for the purpose of these figures the result of what happened in dealing in automobiles.

The Court: Let me see if I understand you. Schedule VII, however, does not contain any adjustment on that score, does it?

The Witness: No, sir.

The Court: Schedule VII charges off the entire thing.

The Witness: Everything, the complete operation of the Webster Motor Car Company.

The Court: Mr. Leahy, are you willing to stand on Schedule VII? If you are, then that other Schedule V vanishes from the case.

Mr. Leahy: That is true, but we would like to stand on Schedule V because we believe there should and ought to be an apportionment of Mr. Webster's

salary to the automotive operations of the Webster Motor Car Company, and an apportionment over against the seafood company of so much of his salary as the time which he spent at that time fairly represents in the salary figure.

The Court: You may proceed.

By Mr. Leahy:

Q. Did you proceed to make the adjustment which you have just explained? A. Yes, sir.

[831] Q. Where does that appear in Schedule V? A. In Schedule V, in line 2, we added back to the yearly profits which you read before the amount of salary paid in full to Mr. Webster. We added back the complete amount of his salary to the profits to arrive at a figure as though Mr. Webster had been paid no salary at all. In the second section, the lower section, we then deduct an amount which we consider to be a fair proportion of Mr. Webster's actual salary, based on the time which we were advised he devoted to the automotive operations, namely, 20 per cent of his time.

Q. And that appears from the figures, does it, in the first column to the left, 1946, $3,452.49? A. That is correct, sir.

Q. I notice again at the top half schedule you have "Transportation furnished," and that is $1,000 that you have entered against that item. What does that represent? A. Mr. Webster was furnished by the Webster Motor Car Company a new Packard car each year at no cost to himself. The expense of driving the car, the interest on carrying it finance-wise, taxes on it, insurance, gasoline, oil, tires, tubes, repairs, and so forth, were paid by the

Webster Motor Car Company. Mr. Webster drove that car principally around [832] Baltimore and on the Eastern Shore of Maryland at no expense to himself. We considered that an allowance of $1,000 a year was a fair figure for the value of the new car completely expense-free to Mr. Webster.

By the Court:

Q. You mean you charged the balance of that cost to the other two enterprises, is that it? A. In effect, yes, sir.

By Mr. Leahy:

Q. How about social security and insurance? What does that item represent? A. Mr. Webster received the benefit of the company paying the normal social security, old age benefits tax, paid by the company for him each year, and he was also the beneficiary under an employees' group insurance policy, on which the company paid the full premium, and charged to expense of operations. We eliminated that item and prorated it back in the proportionate operating time we have discussed before.

Q. Was that prorated back on the 80-20 theory that the salary was prorated? A. Yes, sir.

Q. "Other personal services," what does that represent? A. Mr. Webster—I don't know the exact amount of [833] time—but at various intervals had one or two boys who worked at Webster Motor Car Company who would act as janitor for him at his home. He was on the Eastern Shore a good bit and they would act as chauffeur for Mrs. Webster. Personal bills were paid for Mr. Webster and all these personal services throughout the year, including the preparation of his tax return, and the

like, it was considered a fair value of $50 a month would be a fair nominal figure to place on the expense to the company which they had paid to his personal benefit.

Q. I notice you have one item under 1951 of $3,840.26, which you added on, and against it is the legend "George F. May Company (recovered 1953)." Would you explain that item? A. Yes, sir. The profit indicated at the top of your column there for 1951, as per the books, of $1,844.12, is after paying a survey fee of $3,840.26 paid to the George F. May Company as business efficiency experts for certain services which they performed during 1951 for the Webster Motor Car Company. The bills were received, paid and charged to expense. Subsequently, however, in 1953, I believe—and I will check the schedule in a moment—the George F. May Company refunded $3,900, which has been taken into account. We therefore did not consider that an item of income [834] or expense, but have eliminated it, in effect.

Q. Now, as against those items which you added on in the top half of the schedule, did you charge any others off, counterbalancing those? A. Oh, yes; yes, sir.

Q. What were they? A. Well, as I have explained to you, sir, the Webster Motor Car Company was engaged in three different types of operations.

The Court: Suppose you just answer Mr. Leahy's question; it will be easier for us to follow this complicated matter.

The Witness: They were dealing also, as I mentioned, in securities; and whatever gains or losses they suffered in dealing in securities, including the interest and dividends received from those securities, we did not consider to be properly a part of the automotive income, so that any money which they made in dealing in securities, either in the form of

gains on the sale or in dividends, or interest, we deducted from the book profit to reduce that profit.

By The Court:

Q. Going back to Schedule VII, which might be said to be the summary of the five preceding schedules, were the deductions you just now speak about taken to arrive at the profit shown in Schedule VII? [835] A. Schedule VII are the books of the company without any adjustment of any nature.

Q. My specific question is, were the deductions that you just now spoke of taken in Schedule VII, those profits on securities, and so forth? A. Schedule VII includes the profit on stocks and includes interest on bonds and dividends.

Q. In other words, Schedule VII is subject to that deduction? A. Yes, sir.

Q. Is there any schedule here that might be called a corrected or adjusted schedule? A. Schedule V, sir.

Q. Schedule V? A. That is the schedule which adjusts the books to the amount credited here and sets forth each of the items of adjustment that are being made.

Q. In other words, the automotive profits shown in Schedule V are somewhat different from the profits shown in Schedule VII? A. No. The automotive profits shown in Schedule VII are transferred directly to Schedule V at the top of the page. They are the exact figures.

Q. I am afraid you didn't understand the question. The automotive profits shown at the bottom of [836] Schedule V—those are the final figures,—— A. Yes.

Q. Differ from the profits shown in Schedule VII, do they not? A. Yes, sir.

The Court: Mr. Leahy, I wonder if I might inquire, is the plaintiff going to stand on Schedule V or Schedule VII?

Mr. Leahy: We hope to stand on Schedule V, Your Honor.

The Court: Very well.

* * *

By Mr. Leahy:

Q. Did you deduct the gains on sale of securities, and the dividends and interest received, from the automotive profits theretofore appearing? A. Yes, sir, we did.

Q. And those are the items where you deducted from the profits of Webster Motor Company, $2,202 for dividends and interest in 1946, and $16,125.27 on gain on sale of securities? A. Yes, sir, in 1946.

Q. Then the total deductions from the profit of the Webster Motor Company, after adjusting Mr. Webster's salary, [837] amounted in total to $21,780.33; isn't that right? A. Let me follow you on the figures, sir. What column are you on?

Q. Just on the first column, 1946. A. Yes, that is right.

Q. $21,780.33? A. That is correct.

Q. Just below that figure are "Net additions—deductions, $4,317.89." What figure does that represent? A. That represents the net adjustment made to the book profit of $42,000 after adding back Mr. Webster's entire salary as paid, after adding back the entire amount of the allowance for transportation, social security and allowance for personal services, and after deducting from that the dividends secured, the gain on securities, and the pro rata portion of Mr. Webster's salary charged to automotive operations, we find we get a net deduction for the purpose of the claim here of $3,417.89.

Q. In other words, it made the automotive profits for that year $38,308.98 instead of $42,826.87, which would

be the automotive profit under Schedule VII; is that right? A. That is correct, sir.

Q. And you have done that, have you not, right down through the years 1947, 1948 up to and including the 31st [838] day of March, 1952; am I right? A. Yes, sir.

Q. And the gross automotive profit then appears as $227,998.60? A. That is correct.

Q. Is that correct? A. That is correct.

Q. Now, does that total figure include all adjustments made with regard to the apportionment of Mr. Webster's salary, the elimination of gains on sales of securities, the dividends, interest, and all of those things? A. It does, yes, sir.

Q. And does that Schedule V then reflect from January 1, 1946 the profit each year made by the Webster Motor Car Company after the motor operations of the company have been segregated from those other operations? A. Yes, sir, it does.

Q. Now, Schedule VI is a detailed explanation, is it not, of all this apportionment business that we have been talking about? A. That is correct; it is supporting to Schedule V.

Q. Schedule IV, we talked about this morning and we won't take up the time to repeat now, but I have this question to ask, Should the Webster Motor Car Company be reimbursed [839] for the profits which it has lost by reason of having had its franchise cancelled, would there be any right in the Webster Motor Car Company then to claim anything for these unrecovered costs of leasehold improvements?

* * *

[840] A. No, sir; they would not have the right to recover it, in my opinion, provided they recovered at least to the

extent of the unused portion, which was seven and three-quarter years on that lease.

By Mr. Leahy:

Q. In other words, had they used up their entire leasehold, that is the seven and a half or seven and three-quarter years, they would have amortized that? A. They would have amortized it as part of the figures in that report.

Q. Just two very short questions on this Schedule III. [841] Would you tell us what the furniture and equipment and the loss thereon is?

The Court: I wonder if that isn't de minimis, Mr. Leahy?

Mr. Leahy: It is to me. Let's let it go.

By Mr. Leahy:

Q. Schedule II relates again to matters which we have already been over; isn't that true, Mr. Fincham? A. Yes, sir; we discussed that earlier, I believe.

Q. And is Schedule I-A, when we come to that we come to that period of time following April 1, 1952, when they were engaged in business and had, I believe, another automobile franchise. Am I right? A. Yes, sir, that is correct.

Q. And what does that Schedule I-A tell us, very briefly? A. Schedule I-A sets forth the entire results of operation of the Webster Motor Car Company for the period from April 1, 1952 to December 31, 1953.

Q. And the gross loss as of December 31, 1953 amounted to $34,637.36; is that right? A. That is correct, for a 21-month period.

The Court: May I ask this before you leave this schedule, Mr. Leahy? That is also an item that

is not recoverable if [842] the items in the Schedule A are recovered; is that correct?

Mr. Leahy: Schedule I-A, Your Honor.

The Court: Yes. In other words, isn't Schedule I-A in the same class as Schedule IV?

Mr. Leahy: No, Your Honor, for this reason: Schedule IV relates to the Webster Motor Car Company while it was still operating its lease, and refers only to the leasehold interest; whereas Schedule I-A, as I understand the witness, is restricted solely and only to the losses which are incurred subsequent to April 1, 1952 and include the pro rata amortization, if Your Honor will notice, in the last column on page 58; so that a portion of Schedule IV—follow me, Mr. Witness, I want to ask you a question——

The Court: Mr. Leahy, before you ask the next question, I don't think I made my question clear to you. Schedule I-A represents the loss on the operations between April 1, 1952 when the franchise was cancelled, and December 31, 1953, when the Webster Motor Car Company closed its doors. Now, if you recover in Schedule V the profits that you reasonably anticipate, you can't also recover the losses in addition, can you? In other words, wouldn't that be a duplication? That is what I mean, that is what I had in mind.

Mr. Leahy: I see Your Honor's point. It hadn't occurred to me before on that theory, Your Honor. It may be [843] that there would be a balancing of the accounts there.

The Court: Well, that is what I thought.

Mr. Leahy: Yes, there might well be. I see you are smiling at me, Mr. Witness; was I all wrong?

The Witness: Yes, sir, in my opinion you were, but that's all right.

Mr. Leahy: May I ask him why?

The Court: Yes, indeed.

Mr. Leahy: I always want to know why.

The Witness: Schedule I-A is comparable to Schedule VII in that for the period subsequent to the closing this shows the entire results of the operation of the Webster Motor Car Company. That operation was, again, adjusted by reason of Mr. Webster's non-allocable time to get the amount of loss claimed in the summary schedule. Now, Schedule V sets forth what would have been a profit of an average of $36,000 a year.

[844] Q. Wait a minute, now. You mean Schedule IV? A. Schedule V.

Q. $36,000? A. However, instead of making $36,000, we lost an adjusted figure for this of $24,000. Therefore, recovery is justified not only I think for the loss, but for the profit also. You were minus $24,000, not plus $36,000.

Q. You mean you lost that over and above the profit which we lost too? A. Yes, that is correct. You actually lost this out-of-pocket.

Q. Could we look at that schedule for just a moment?

The Court: I think this clarified the doubt that I had in my mind.

By Mr. Leahy:

Q. Does Schedule I help us in any way as being a more detailed explanation of the operation and Schedule I-A? A. Schedule I, sir, would be comparable to Schedule V.

Q. V? A. That's correct, except that it covers the period subsequent to the cancellation or termination of this

franchise. It covers the period from April 1st, 1952, to December 31st, 1953.

The Court: In other words, that is an adjusted [845] schedule?

The Witness: These are the adjustments, sir.

The Court: This Schedule 1 is really an adjustment of Schedule 1-A?

The Witness: Yes.

The Court: That shows an automotive profit loss of $24,000 instead of $34,000?

The Witness: The books indicate $34,000. We adjusted that loss downward to $24,000, that's correct.

By Mr. Leahy:

Q. How was that done? Did you adjust Mr. Richard C. Webster's salary? A. We adjusted Mr. Richard C. Webster's salary, his transportation, and so forth, on exactly the same lines, to reduce this loss as we had adjusted them in Schedule V.

Q. But as a matter of fact had Mr. Webster during that period of time also agreed to a reduction in salary? A. He had, yes, sir.

Q. From what to what? A. I believe that he was drawing anywhere from—let's see.

Q. In Schedule V it is in round numbers of $15,000. A. In 1946 it was $15,000. In 1947, $15,000. In 1950 it dropped down $9300. In 1951, $13,000. In 1952, $9,000, and in 1953 he dropped his salary to $6900.

[846] Q. What did he do on—I think from April 1st, '52 to December 31st, 1952 I think the correct salary was $7,039, and in 1953 it was $6,937. A. That is correct. The $6900 was for a 12-month period. The $7,000 was

for a 9-month period. The original three months of that being a part of Schedule V.

Q. What represents the total loss which the company suffered in that period we have described in which it was minimized or attempting to minimize losses? Is it $24,812, or is it $34,637.36? A. They actually lost $34,000. You are claiming here $24,000.

The Court: The adjusted loss is $24,000.
The Witness: The adjusted loss, yes, sir.
Mr. Leahy: Good enough.

By Mr. Leahy:

Q. We are back to page 56, and it is the summary of losses and damages claimed. That I think gives us a general total over-all picture of the other schedules which we have just briefly analyzed. A. Yes, sir. This summarizes the net results of all of those schedules and puts them together in one figure.

* * *

[850] Q. In connection with the income tax returns, do you recall whether or not the returns were consolidated returns or the individual returns of the various corporations? A. In so far as the Federal returns are concerned, there are a number of years in which consolidated returns were filed, and in one or two or possibly three years I believe individual returns were filed. That is, individual corporate returns.

Q. Do you recall whether on any of the returns which [851] you made you used in a column which was designated upon the return to advise the Government as to the time or amount of time which Mr. Webster put in to the various two companies, the motor car company and the sea food

company, and there was a phrase used "full time". Do you recall using that phrase? A. Yes, sir, definitely.

Q. Would you explain now what was the meaning of "full time" as used in those returns? A. Obviously as far as a consolidated return is concerned, the use of the word "full" is proper. As far as the filing of individual returns, one for the Somerset Sea Food Company, and one for the Webster Motor Car Company, Mr. Webster devoted the major portion of time to Somerset, and was on the premises at Somerset. Therefore we considered the use of the word "full" as proper.

The Court: In the Webster——

The Witness: In the Somerset.

The Court: You were asked about Webster.

The Witness: As far as Webster is concerned, since Mr. Webster was actually protecting an investment of some hundred odd thousand dollars in the sea food company, we felt that we were justified in reporting his time as fully devoted to the protection of the interests, of the Webster interests, in Somerset. Hence the use of the word "full" in both cases. He was actually devoting his physical time [852] at Somerset for the benefit of Webster.

The Court: You have answered the question.

* * *

Cross-Examination by Mr. Denit:

Q. Mr. Fincham, do you engage in the practice of your profession under your own name or in the name of some proprietorship? A. James M. Fincham & Company, sir.

Q. That means that you have associates with you? A. Yes, sir.

Q. Is Mr. Graf one of your associates? A. He is at the present time, yes, sir.

Q. And Mr. Graf was the treasurer and bookkeeper of The Webster Motor Car Company, was he not? A. That is correct, sir.

Q. And he assisted you in the preparation of tax returns of the corporation? A. No, sir.

Q. Did he assist you in auditing the books of the corporation? [853] A. He assisted during 1953, I believe. If I recall correctly Mr. Graf became an employee of ours in I think it was about November or December of 1953 or thereabouts, or the 1st of January, '54. I would have to check my records, sir.

Q. These schedules about which you have testified were prepared when? A. During March and April of 1955 and May.

Q. And at whose insistence were they prepared? A. At the request of counsel for Webster Motor Car Company.

Q. Were you asked to embody in the schedules only those things which appeared on the books and records of the Webster Motor Car Company? A. I don't quite follow your question there, sir.

Q. Well, you were asked to do what accountants are generally employed for, namely, to prepare schedules from the books and records of your client? A. That is correct, yes.

Q. And that's what you were asked to do in this case? A. That is correct.

Q. Who supplied you with the estimate of 20 percent? A. Mr. Harry French, Mr. George Graf, Mr. Richard Webster, Mr. Donald Webster.

Q. You merely accepted that? You didn't know about [854] it of your own personal knowledge? A. That is correct, sir.

Q. And the estimate is based upon the allocation of part-time to the protection of the investment in the sea food business, and part-time to services in connection with the automobile business, is that correct? A. Yes, sir, and also the dealing in securities.

Q. What percentage of Mr. Webster's time was allocated to the dealing in securities? A. No specific allocation was made.

Q. Why not? A. There was no particular purpose that we could see in allocating a particular part of his time for that as distinguished from a separation of Somerset, but combined.

Q. But in 1946 according to Schedule V Webster Motor Car Company had a profit on the sale of securities of $16,125.27, didn't it? A. Yes, sir.

Q. Handling sales of that kind required time, did it not? A. Definitely.

Q. Can you tell us why you didn't allocate some time to the handling of those securities? A. The total of 80 percent which was allocated was combined for the Somerset Sea Food and the securities. There [855] was no particular purpose that we could see in separating the time directly spent on securities alone.

Q. What amount did the Webster Motor Car Company have invested in securities generally in 1946? A. I have no idea at this moment, sir. I could refer to our reports and determine it for you.

Q. Would you do that, please, sir? A. Could I have your general ledger?

The Court: Aren't you going a little far afield? The question is, how much time was devoted, not how much money there was.

Mr. Denit: I think it makes a great deal of difference, Your Honor, when you see what the securities consisted of.

The Court: Why don't you ask about it.

By Mr. Denit:

Q. What percentage of the securities which Webster Motor Car Company had was represented by its investment in the sea food business? A. I would again have to refer to the detailed schedules of securities, and I believe that they are in the tax return submitted here.

The Court: Were these securities outside of these inter-related companies?

The Witness: Oh, yes, yes, sir. The securities [856] that they bought and sold were completely outside of Somerset Sea Food. They have never sold any of the Somerset Sea Food stock.

The Court: You mean outside securities bought and sold on the market, is that it?

The Witness: Yes.

By Mr. Denit:

Q. You prepared the tax returns for the sea food company as well, did you not? A. Yes, sir.

* * *

[857] Q. Is Exhibit No. 12 the Federal income tax return that you prepared for the Somerset Sea Food Company for the year 1951? A. Yes, sir, it appears to be.

Q. Is the signature at the bottom of the page your signature? A. This is a copy of my signature, but it would have been signed officially by myself on the original return.

Q. Will you turn to Schedule E, compensation of officers. What does that show with respect to the amount of time Mr. Webster devoted to the sea food business? A. It is shown here, sir, as "full".

Q. And it was shown in the Federal income tax return by Webster Motor Car Company as "full" too, wasn't it? A. That is correct, yes, sir.

Q. Can you tell us how you as an accountant determined that he was spending full time with the sea food business and full time with the automobile business? A. The full time spent with the sea food business would be directed toward the daily working hours, whereas in the case of the answer "full time" on the Webster Motor Car Company return, he was working for their benefit protecting the investment in the Somerset Sea Food Company, and in [858] which in 1951—let's see if I can pick it out of here for you, sir.

The Court: I am going to ask you a question at this point: Your schedules are prepared on the basis that Mr. Richard Webster devoted 20 percent of his time to his work as an officer of the Webster Motor Car Company. Why do not the tax returns of the Webster Motor Car Company state that he devoted 20 percent of his time?

The Witness: The answer to that, sir, would lie in the fact that this return was prepared in 1952 at which time Mr. Webster is a sole corporation, he is the individual owner of all of these corporations. Whatever he does working full time is done for the benefit of all of them. He was not an officer of the type that we frequently find in corporations who spend one hour a week at one occupation for which he draws a nominal salary.

The Court: Why doesn't the same apply to these schedules in this case?

The Witness: I don't quite follow your question there, Your Honor.

The Court: In your income tax return you reported 20 percent of the time as being devoted by Mr. Webster to the work of the company. No, I mean his full time. In these schedules you show that he devotes 20 percent. Now why shouldn't the same be shown in both instances?

[859] The Witness: I don't think it would be proper to completely delete from the Webster Motor Car Company any salary provision for Mr. Webster at all. I don't think that would be equitable, frankly, *even though he was spending most of his time at* Somerset, Deal Island.

The Court: You are not answering my question. You are answering some question that I didn't ask. My question is: Why do you use the term "full time" in one instance, and "20 percent" in the other?

The Witness: The purpose of the 20 percent was to get a profit for a particular operation for which you do not report taxes on that separate operation but on your overall operation.

The Court: I see.

The Witness: For this purpose here it was a division of time, and a division of income.

By Mr. Denit:

Q. Do you mean by that it was for the purpose of building up a claim against somebody? A. Not at all, sir. The purpose was to endeavor in a very sincere and a straightforward manner to find out how much was the automotive profit, to what extent had a profit or loss been suffered. What was the automotive operation.

Q. Isn't this a fact, Mr. Fincham, that when you put in the schedule of the Webster Motor Car Company that Mr. [860] Webster was devoting his full time to the business, you increased the deductions which might be taken from

income, so as to reduce income tax liability? A. I don't think, sir, that the inclusion of the word "full" there is a governing factor. He was paid by Webster Motor Car Company check.

The Court: Why don't you answer the question, Mr. Fincham?

The Witness: I thought I did, sir.

The Court: No, that is not the question.

The Witness: Well, I do not believe that the inclusion of the word "full" is the governing factor as to whether it is an allowable deduction.

The Court: Suppose you had put down 20 percent of the time, how would that have affected the income tax return?

The Witness: I think it would affect it, sir, as far as I was concerned at this point, that I would not be properly reporting the situation. He had in 1951 $109,000 involved.

The Court: Would it affect the tax liability of the company if you had put down "20 percent" in that column instead of "full"?

The Witness: No, sir, I do not believe so.

By Mr. Denit:

Q. Well, isn't it a matter within your experience, [861] Mr. Fincham, that a revenue agent examining the return of a corporation requires some showing as to the amount of time which the officers devote to the business of the corporation? A. Yes, sir, definitely.

Q. And that is particularly true when the officer claiming a deduction is the owner of all the stock of the corporation, isn't it? A. That is very true.

Q. The effect of claiming a salary rather than paying a dividend is to decrease the corporation tax liability, isn't it? A. If you pay a salary for that purpose, yes.

Q. Well, where one person owns 100 percent of the stock of the corporation, isn't the effect of allowing him a salary to escape liability with respect to the corporation income tax? A. I don't follow your question. I think I do, and I will answer it, if I understand it correctly. At a $15,000 level, I am quite certain that the bureau would not, and has not in examination of a number of these returns, held that to be an unreasonable salary.

Q. That would be where the statement is true that the man was devoting his full time to the business, wouldn't it? A. We believe that Mr. Webster was devoting his full time to the Webster Motor Car Company. The protection of [862] $109,000 investment we think is worthy of an expenditure of $15,000 or some figure thereabout. Definitely. And our returns I believe have been audited through 1950 and 1951, and the bureau has agreed with us. They found no dispute on that fact.

Q. In 1951 Mr. Webster was paid a salary by the sea food business of $3200, wasn't he? A. Yes, sir.

Q. And in 1952 as shown by Exhibit 13, Mr. Webster was paid a salary of $2850, wasn't he? A. Yes.

Q. That was also upon the representation that he was devoting his full time to the sea food business? A. Yes, sir.

Q. Mr. Fincham, did Mr. Webster ever actually return to the motor car company 80 percent of the salary that he received during any of these years? A. No, sir, not to my knowledge.

Q. You referred to the loss sustained on account of a leasehold, unexpired leasehold interest. Who was the landlord? A. The Somerset Realty Company.

Q. Who owned Somerset Realty Company? A. That stock is held by I believe three or four individuals. I am speaking from memory now, sir.

[863] The Court: He brought that out this morning from Mr. French, Mr. Denit.

By Mr. Denit:

Q. Well you knew that Somerset Realty Company was wholly owned by the Webster family, didn't you? A. That is correct, yes, sir.

Q. Did you find anything on the books of the Webster Motor Car Company to indicate what disposition he made of this leasehold interest? A. They abandoned it.

Q. To whom? A. To the landlord.

Q. And the landlord was the Somerset Realty Company? A. The Somerset Realty Company.

Q. So the effect of the abandonment was to create a loss for the Webster Motor Car Company and give the Somerset Realty Company an asset that they didn't pay a dime for? A. You might figure it that way, yes, sir.

Q. Can you figure it any other way? A. The question as to whether it is an asset is whether it is disposable. It is there. The Webster Motor Car Company certainly couldn't tear out improvements which they put in there. Therefore they abandoned them.

Q. As their auditor and accountant did you read the lease that the Somerset Realty Company made to the Webster [864] Motor Car Company? A. No, sir, I did not.

Q. Do you know that Webster Motor Car Company paid Somerset $300 for the rent of that property? A. I am aware of that.

Q. Do you know Somerset re-rented after Webster abandoned it to Somerset for $600 a month? A. I believe that is the figure of the present rental, yes.

Q. Did you undertake to ascertain either from the books or from the conference with your client whether that

abandoned leasehold interest had any value? A. No, sir. I did not.

Q. You just assumed it to be worthless? A. Insofar as the Webster Motor Car Company is concerned, they held no title to it. It was worthless.

Q. Did you know that in addition to having a lease for a term of 10 years, they had a right to a renewal for another five years? A. I had not read the lease, no, sir.

Q. Mr. Fincham, you also prepared the personal income tax return for Mr. Webster, did you not? A. During certain of the years, yes, sir. I believe we first prepared them in 1948, and thereafter.

* * *

[866] Q. I show you what has been marked Defendants' Exhibit 14(a), being the joint return of Richard C. Webster and Kathryne C. Webster, and ask you if you prepared it. A. Yes, sir.

Q. There is included within the return a form W C-2. Did you prepare that also? A. No, sir, we did not.

Q. Do you know who did? A. These should have been prepared by the bookkeeper for the Somerset Seafood Company.

Q. Do you know whether such a form was prepared and a copy of it sent to you? A. If you have the copy here I assume that it was prepared and that we received the original for filing with the tax return. We did not prepare W C-2s or 509s, in this case.

Q. I show you what has been marked Defendants' Exhibit 14(b), the 1950 return and ask you whether you prepared that. A. Yes, sir.

Q. Did you also prepare what have been marked Defendants' Exhibits 14(c), 14(d) and 14(e)? A. 1951, yes. 1952, yes. [867] 1953, yes.

Q. Now, Mr. Fincham, will you examine those returns, please, sir, and tell us whether or not Mr. Webster reported any of these items of benefit that were furnished to him by the corporation, and I mean by that transportation furnished; social security; insurance; other personal services, aggregating $1,812? A. No, sir, they are not reported in any of these.

Q. Do you know why they were not reported? A. Because he did not receive them in cash or in any other form.

Q. They were services furnished to him which he otherwise would have had to pay for, were they not?

By the Court:

Q. Are these social security payments deductions that the employer makes from the salary or are they reimbursement to the employee for the employee's contribution to social security? The social security payments are of two kinds: The employer's contribution and the employee's contribution. Now, which are these? A. The social security taxes here represent the percentage of the tax on the employer, which the employer pays.

Q. Well, then that is an expense to the employer? A. That is correct.

[868] Q. It is not income to the employee? A. That is correct.

By Mr. Denit:

Q. Why are they returned to income? A. For the purpose of divisioning the profit of three general operations, sir, and for no other reason.

Q. How about insurance? What kind of insurance was that? A. Group life insurance.

Q. Is Mr. Webster the beneficiary? A. I believe so, yes, to the best of my knowledge.

Q. And the premium paid by the corporation? A. The premium was paid by the corporation.

The Court: Mr. Denit, may I interrupt you? I want to go back to a question that you asked sometime ago, and I heard the same thing repeated several times. Now, I read the lease, Plaintiffs' Exhibit No. 23, several times, and I don't find any five-year renewal provision.

Mr. Denit: May I see it?

The Court: Yes. I think it is an 11-year lease.

Mr. Leahy: That is all it is, Your Honor.

The Court: I read it when it was first introduced, and when you mentioned a few minutes ago something about a [869] five-year renewal, I called for it again and read it.

Mr. Denit: I think you are correct, and I was wrong about that, but it is in one of these leases. I meant, however, to refer to paragraph 5 of the lease which continues it in force from year to year until terminated.

The Court: That is a little different—subject to 60-day notice.

Mr. Denit: Yes, sir. It may be continued in force from year to year.

The Court: Subject to a termination on 60 days' notice.

Mr. Denit: Right.

By Mr. Denit:

Q. "Other personal services" you say is an arbitrary figure assigned as salary for a janitor or chauffeur; is that correct? A. That is correct.

Q. And that was paid by the corporation? A. Yes, sir.

Q. Mr. Webster personally got the benefit from it? A. Yes, sir.

Q. And transportation furnished, that was paid by the corporation, wasn't it? A. Yes, sir.

[870] Q. And Mr. Webster personally got the benefit of it? A. Traveling on company business, yes, he did.

Q. Why do you return it to income if he was traveling on company business? A. Again, the return to income was to divide that paid between automotive operations and to operations devoted 150 miles away, sir.

By the Court:

Q. Why is it income if it is done on company business? Isn't it part of the company expense? Why is that income to Mr. Webster? A. That is not income to Mr. Webster because it is on company business, sir.

Q. Well, I thought you treated it as income. A. To Mr. Webster? No, it would not be; no.

By Mr. Denit:

Q. Didn't you treat all three of these items under the general designation "Estimated cost of personal services for Richard C. Webster"? A. That is correct, yes, sir.

Q. And he didn't return any of these items on any income tax return for the several years that you have before you? A. No, sir, they were not taxable income to him. He is not permitted under the Internal Revenue [871] laws to return to income the social security tax which the employer pays for him.

Q. Did he pay any? A. Yes, he paid his own, sir. It was withheld from his salary and paid in the normal course.

Q. How about "Cost of transportation." Is he permitted to return that as income? A. It was not necessary for him to return it as income, when he was traveling on company business. Again, we were only trying to apportion company expense between various operations. Richard Webster was not receiving a check for $1,000, or anything like that. He was using a car on company business.

Q. The other personal services certainly weren't on company business, were they, the janitor and the chauffeur? A. I don't know. If you consider the fact that Mr. Webster spent weeks and weeks and weeks in Salisbury, Maryland, and Mrs. Webster was in Baltimore, she might have occasion to have her grass cut, and I don't think it is out of line that a company should furnish a janitor to go up and cut her front grass, or drive her to the doctor if she were ill and her husband out of town.

Q. We are not concerned with whether you think it is out of line or not; we are concerned with whether this was [872] income to Mr. Webster in a form different from a check. A. I do not consider that it would be income, no sir.

Q. Were you told when you prepared these schedules the purpose for which they were to be used? A. May I ask which schedules are you now referring to, sir?

Q. All of the schedules that you have referred to here. A. Yes, sir.

Q. What were you told specifically? A. To prepare schedules setting forth the automotive profit of the Webster Motor Car Company, and such other losses as in counsel's mind they should include in there, the leasehold improvement loss; the loss of equipment, and so forth, and anticipated profits.

Q. Was there ever any apportionment of Mr. Webster's salary on the financial statements submitted to Packard Motor Company? A. Not to my knowledge, no, sir.

Q. Was there ever any apportionment on the books of the Webster Motor Car Company? A. Not to my knowledge, no, sir.

Q. Or on Webster's personal books? A. No, sir—again, not to my knowledge.

Q. Or on the books of the Somerset Seafood Company? [873] A. No, sir, other than what he was actually paid by that company.

Q. Or on the books of the Somerset Realty Company? A. No, sir.

Q. Did you ever see any records of either the Somerset Seafood Company or the Webster Motor Car Company indicating the amount of time that he was spending with respect to each of those enterprises? A. I have never seen any written records on that, no, sir.

The Court: Just answer yes or no.

The Witness: No, I haven't.

Mr. Denit: I think that completes the cross-examination. We would like to have an opportunity to look at these statements overnight, and if there is no necessity for asking further questions we won't ask them.

The Court: I know you won't unless you think it is necessary, of course. I know you well enough to know that.

* * *

Redirect Examination by Mr. Leahy:

Q. Mr. Fincham, do you recall whether the property [874] of the Webster Motor Company remained unrented and vacant for over a year, to a year and a half after 1953? A. It remained unrented, sir, I believe until about December of last year, 1954.

Q. And what time was it, if you can recall now, when the motor company was compelled to close its doors? A. December 31, 1953.

Q. So for over a year it was vacant and impossible to rent? A. That is correct.

* * *

[922] Mr. Leahy: If the Court please, I now offer in evidence from the deposition of Samuel D. Braden taken Tuesday, June 12, 1954, certain pages, and some I have omitted. And if counsel would just indicate when I come to the point I will say I am going to omit, if you want me to read it, I will continue to read.

(Reading:)

"Examination by counsel for plaintiffs.

"*By Mr. Leahy*:

"Q. Mr. Braden, would you kindly state your full name for the record, please? [923] A. Samuel D. Braden.

"Q. Where do you reside, Mr. Braden? A. 3315 West Coquelin Terrace, Chevy Chase, Maryland.

"Q. How are you employed at this time? A. At this time I am not employed, sir. I resigned my position from Willys as general manager about three weeks ago.

"Q. Would you identify Willys just a little more for the record? A. Willys Motors, Incorporated.

"Q. Prior to that time what was your employment? A. I was with Packard Motor Car Company.

"Q. How long had you been with Packard Motor Car Company before you went to Willys? A. I started with Packard Motor Car Company in February, I believe it was, of 1937 and was with them until 1942, the latter part of 1942.

"Q. What had been your experience prior to 1937 when you went to Packard insofar as employ-

ment in the automobile industry is concerned? A. Well, I with General Motors, different divisions of General Motors Corporation, back to 1925.

"Q. Now coming down to Packard in 1937, [924] in what capacity were you employed when you first entered the service of Packard? A. Regional manager for Packard in the Detroit region.

"Q. Could you give us a little further information upon what the office of regional manager meant? A. Well, at that time Packard operated largely with distributors, and in the region of Detroit I had under my supervision distributorships in Grand Rapids, Michigan, Saginaw, Detroit, and Packard had their own branch, Toledo, and Indianapolis, Indiana.

"Q. Now, you used the word there 'distributorship.' Would you explain just what that means? A. Well, a distributorship is an individual or a company, a corporation, appointed by Packard Motor Car Company to supervise a rather large area of territory.

* * *

[925] "A. Well, in each distributor's territory, of course, there were towns and cities which had competitive dealers handling competitive lines to Packard and it was the distributor's responsibility to try to get Packard dealers that would adequately represent Packard in each of those places and to secure for Packard their share of the business in the whole territory.

* * *

[926] "Q. And at that time where were you employed by Packard? A. I came to Washington as zone manager for Packard in November of 1945.

"Q. Now, do you recall why it was that Packard set up the zone method of distribution in preference to the earlier distributorship distribution? A. There were many reasons for it, I believe, but one of the chief ones, of course, was the fact they had direct contact with the retail dealers who sold their product and had direct supervision over those dealers, whereas under the old distributorship system they had to work through their distributors. Secondly, of course, there was the profit motive. The override which was given to the distributor, would then go to the zone and be channelled back into Packard Motor Car Company's treasury.

* * *

[930] "Q. When distribution was under the policy of distributors, do you recall whether there was a distributor in Baltimore? A. Yes, sir.

"Q. Who was he, do you know? A. Zell Motor Car Company.

"Q. Did he have any dealers under him? A. Yes, sir.

"Q. Do you recall who they were? A. Well, as I understand it, I think he had Will Scott and Webster and, I believe, Northwestern, and, I believe, DeBaugh, too.

* * *

[932] "Q. Now, during the time that you were zone office manager here in Washington, did you become pretty familiar with the competitive conditions as they existed in Baltimore? A. Yes, sir.

"Q. Did you know Mr. Webster, whom you said, I think, or identified as the Webster Motor Company? A. Yes, sir.

"Q. Was he the president of the Webster Motor Car Company? A. Yes, sir. He was for a time; and then later, I believe, another man was appointed to that office.

"Q. That is Mr. Richard Webster? A. Mr. Richard Webster; that is right.

"Q. By the way, how long have you known Mr. Richard Webster? A. I became acquainted with him when I first came to Washington as zone manager, I think, perhaps within 30 days after I assumed my duties.

* * *

[934] "Q. Do you recall how long Mr. Webster had been a dealer engaged in the retail sale of Packard automobiles and parts when you came here as sales manager? A. Well, I don't know exactly. I believe I was told that he had been connected with Packard either in retail sales capacity or as a dealer for over 15 years, but of my own knowledge I couldn't say.

"Q. Of course, you had the opportunity while you were sales manager here upon inquiry and hearing from others to learn his reputation as a dealer? A. Yes, sir.

"Q. And as a salesman? A. Yes, sir.

"Q. What was it? [935] A. Excellent.

"Q. Now, do you recall a time while you were here as zone manager that the Webster Motor Car Company suffered a loss through fire? A. Yes.

"Q. Do you remember about what date that was? A. Again, we have records on that exactly.

"Q. Were you made acquainted with that fact? A. Yes, sir. The day after the fire.

"Q. And at that time assisting in the office here as zone manager, could you give us the names of other officers? A. I believe Mr. Marshall Beck was assistant zone manager for me, and I believe Mr. Alex Denholm was the district manager in charge of the Baltimore territory."

I was going to omit the rest of that page and on page 30 about one half of it down:

"Q. Now, to return to the Webster Motor Car Company. Do you recall whether you alone or in company with other officers of your branch office here, or your zone office, made any investigation into the condition resulting from the fire of the Webster Motor [936] Car Company? A. Yes, sir, we did. Mr. Beck and I went to Baltimore, I think, the day following the fire, and talked to Mr. French and Mr. Donald Webster and later to Mr. Richard Webster regarding the situation.

"Q. Who was Mr. French? A. He was their general manager, of the Webster Motor Car Company."

Then I was going to omit down as far as the first half or first third of page 31:

"Q. Was there any discussion as to the future of the Webster Motor Car Company as a Packard dealer had at the time with either, both, or all of these gentlemen you have mentioned? A. Yes, sir, there was.

"Q. You tell us in your own words what they were. A. Well, naturally, after the fire there was a great question as to whether or not Webster

should try to get a building rebuilt or to do something to get back in business or whether he should liquidate and go out of business at that time. We discussed with all of the members of the organization, of the firm there, Mr. Donald Webster, Mr. French, and Mr. Richard Webster, [937] the advisability and the practicability of them going back into business as a result of the fire. They were not covered fully by insurance, as I recall it, and the fire caused a rather substantial loss to the firm. In the beginning, of course, there was a question as to whether or not they could get the landlord to rebuild on that property or just what should be done. Later the landlord, I believe, agreed to sell them the property on what appeared to be a reasonable basis. Then the question was as to whether it would be practical for Mr. Webster or the Webster Motor Company to invest in building or rebuilding a new building on that property.

"Q. Was this talk which you have just given us generally between Mr. Donald Webster and Mr. Webster, Sr., Mr. Richard Webster—— A. Yes, sir.

"Q. —and Mr. French and you and Mr. Beck? A. Yes, sir. I don't recall whether Mr. Beck was present at all of the conversations that we had or not, because we made, all of us in the zone, frequent trips to Baltimore during this period of time, some several weeks, when the decision was being made.

"Q. In other words, wa. 't it a fact that [938] it was a matter of some importance to you and your office here, the zone office, to see to it that, if possible, the Webster Motor Car Company should be maintained as a dealer and continued as a dealer for

Packard distribution? A. That is correct. We felt that it was desirable on our part that if Webster could be reinstated in the business or could rebuild and get back into the business that it would be desirable as far as Packard was concerned.

"Q. In other words, I am not exaggerating, am I, when I put the question to you this way, that the Webster Motor Company had always been found to have been a satisfactory dealer for Packard distribution? A. That is correct. They had a long and good reputation with the customers and the people of Baltimore, and the Webster name, having been so long associated with Packard had some value insofar as then continuing the franchise.

"Q. I think you mentioned the fact that the company had suffered a loss by reason of the fire and that one of the things that was discussed was the possible purchase of the site on which the company's plant had been formerly established, and also as to whether or not the landlord might sell and the company [939] rebuild. Do you recall that was a subject matter of the discussion for quite a bit of an analysis on all concerned? A. That is correct. The Websters, both Donald and his father, Richard, asked my opinion about the matter, whether they should consider buying the building or not; and I believe that my advice to them was that if they thought the investment from a standpoint of a real estate investment was a good and sound thing to do, then they should do it and that they should build on that a building which would be usable for more than just the automobile business, because if anything should happen to Richard Webster or anyone else, the estate might not want to continue in the automo-

bile business and it would be well to have a piece of property that was more versatile than something built exclusively for the automobile business.

[940] "Q. At the time you, as the zone manager of this Washington Zone, were naturally interested from the viewpoint and standpoint of the factory to see to it that the Webster Motor Company as a dealer, if it were to continue as a dealer, should be financially in a sound position as such a dealer, weren't you? A. Exactly. I certainly was interested in that, and Packard was interested in that.

"Q. You certainly felt that you were furthering the interests of your factory in doing what you could in so far as Webster Motor Car Company was concerned, in advising with the officers of the Webster Company to see to it that they set up a good financial position if they were to continue as a dealer? A. Yes, sir. That was definitely my purpose.

"Q. And it was within that theory that you were discussing as to whether they should rebuild or whether they should buy or whether they should continue to lease, or what not, all of those various factors which enter into the situation of that sort? A. That is correct.

"Q. And had the question come up as to whether or not it was the policy of the Packard factory to advance moneys for construction or reconstruction? A. I believe that at one time Donald Webster [941] asked whether or not Packard Motor Car Company ever loaned money to dealers who found themselves in a state of emergency caused by such

a disaster as this; and my statement to him was that we did not.

"Q. But in these discussions, am I right in assuming that there was a mutuality of interest in fixing as to what the best thing to be done under all the circumstances was? A. That is exactly right. We felt that it was a mutual——

"Q. Because what was best for the Webster Motor Car Company as a dealer would also be good for the factory, and vice versa, isn't that it? A. That certainly was our feeling at that time; yes, sir.

"Q. Over what period of time do you recall that those discussions—not discussions, but consideration of what ought to be done were discussed? A. Well, as I recall it, that went over a period of some several weeks, possibly a month and a half or two months. I don't remember.

"Q. Do you recall whether Webster Motor Company made any determination with regard to the method by which it should operate after it had bought the property, whether it should set up another corporation and [942] lease from that corporation, or whether it should go ahead as sole owner of the land, the real estate, the franchise and all? A. Well, after they thought it would be wise to purchase the property and rebuild on it, I believe then the question did come up as to how it should be handled. I believe that I advised them that from the Packard Motor Car Company standpoint that we would prefer that any further investment be kept out of the Webster Motor Car Company corporation setup because we had already complained in the past of diversification of investment

on account of the Somerset Seafood Company some period back on that, which was recognized by them, and steps were taken to try to correct that, but we felt that it would be better, keep a better financial picture of the motor car company if the real estate could be kept out of the Webster Motor Car Company.

"Q. Do you recall now whether that was done? A. I believe it was done.

"Q. The result of these negotiations and discussions, negotiations with the landlord, and discussions all the way around, the Webster Motor Company did buy the real estate, didn't it? A. Yes, sir.

"Q. And did rebuild? [943] A. Yes, sir, they did.

"Q. And the real estate was kept, in so far as the title thereto is concerned, in another company, in accordance with what you stated it would be the best in the Packard notion of what should be done? A. That is correct.

"Q. Do you recall how long a lease then was made by the Webster Motor Company with the owning real estate corporation? A. I do not know definitely about that. I have a hazy recollection, something about a ten-year lease, but I am not positive about that.

"Q. Have you any recollection now as to what the cost of the reconstruction, purchase of land, and so forth, was in so far as the interests of Webster were concerned? A. I don't exactly recall. I don't recall the exact amount of the cost of that, but I think it was upwards of $100,000. Wasn't it?

"Q. Is that your best recollection? A. I believe so; yes, sir.

"Q. You don't recall the lease arrangements? A. No, sir. I wasn't in on that.

"Q. Do you recall when it was that the construction was completed and the Webster Motor Company [944] went into new quarters? A. I think the thing was done very rapidly after they once got into it. I think it was about six months after the fire.

"Q. Do you recall now whether at that time Webster was operating under the regular form contract? A. Yes, sir.

"Q. Which was then in force as between the factory and the dealers? A. That is right.

"Q. Do you recall whether there was any discussion at the time as to what might be the future effect upon the Webster Motor Company if it either directly or indirectly assumed the obligations of purchase, reconstruction and lease obligations? A. Yes, sir. There was, I think, the question asked me by Donald Webster on the basis of the fact that they were going to make a considerable additional investment here, what assurance did they have that they would continue as a Packard dealer. My reply to that was, while the contract, it was true, ran from year to year, that Webster had been a Packard dealer for many, many years, and so long as he continued to conduct his business as he had in the past, there was no reason to expect that he would not continue to [945] be a Packard dealer.

"Q. Isn't it true, and wasn't it true then, let's put it that way, that in your knowledge of Packard policies with respect to these contracts that where

the dealer had been found to be a satisfactory dealer that his contract was renewed from year to year? A. Generally speaking that is true; and, of course, there were so many dealers around the country to give proof to that fact that had been Packard dealers for 20, 25 and 30 years. Always when you approached a man in an endeavor to interest him in taking on a Packard franchise, the question was asked about the security of his contract and the fact that he had to make a very considerable investment to take on the Packard franchise, almost invariably he would raise the question as to what assurance he had that he would continue in the Packard business. And we in Packard always pointed to the length of time which a great majority of our dealers had been Packard dealers.

"Q. Well, that was for the mutual best interests of all concerned in the distribution of Packard products, wasn't it? A. That is correct. It is a very expensive [946] thing for the motor car company to change dealers."

Then I was going to omit the rest of that page and down on page 40 to the last half.

"Q. Do you recall whether or not along in about that time, 1949 and 1950, you were having trouble with the model, that the model wasn't too popular in competition? A. Yes, that is true. Packard chose to remain with the same design that they had. That car was not popular because competitors had made changes in their body styles which more or less made Packard old-fashioned.

"Q. Do you remember how long you felt adversely the competition because of that fact? A.

Yes, sir. During the years of '49 and '50, very decidedly.

"Q. Would you say, then, that from '45 down to about '51, that for the first part of the period, why, the Packard distribution was limited because of war and Government restrictions? A. That's right.

"Q. And after that, because of competition with reference to models, it wasn't until about 1951 that you got steamed up again and going ahead? A. That is correct."

[947] Then I was going to omit the remaining part of that page.

The Court: That is 41.

Mr. Leahy: And take it up again, if the Court please, at page 42.

"Do you recall what, in your judgment, the effect of the multiple dealership policy in Baltimore had upon the distribution of Packard cars? Was there good competition there, in your judgment? Would you recall it? A. Yes, sir, there was. The purpose, of course, of having multiple dealers in an area like Baltimore, or any large city, is to establish good competition between your own dealers in order to assure the public that they are getting full value received for what they buy in both cars and services.

"Q. Because it gives the advantage to the public to go from one dealer to another, either in the purchase of a car—— A. That is correct.

"Q. —or having work done upon the car? A. That is correct.

"Q. And for parts and so forth? A. Yes.

"Q. In other words, there is a resulting advantage not only to the dealer in the factory, but [948] also to the public in the multiple dealer system? A. Well, put it this way: Experience has shown generally that a dealer can only serve a certain territory and can only serve a certain number of customers and then there is a point of diminishing returns which sets in somewhere if the dealership tends to get too large. That has been the general experience, in my experience at least, in this motor car business.

"Q. During your experience while you were the zone manager here, and more particularly with reference to the competition situation in Baltimore, did you find that Zell at any time was complaining about the competition of other dealers there as to how they were doing business, and so forth? A. Yes, sir. I think that is true. I know it is, as far as that is concerned. Zell complained about it. I think it is pretty much of a general thing that does happen. Most dealers complain about competition within their own ranks. But in Zell's case perhaps maybe it was a little more because he had been the distributor in the past; I don't know. I mean, Zell complained a great deal about Schulte's methods of operation and was very insistent that something be done about that.

"Q. Do you recall whether or not he had made any representations to you with regard to the [949] appointment of Schulte, in the first instance, as a dealer? A. Yes. He protested about the appointment of Schulte after he learned that it was about to be done, or that it was done, stating that he didn't feel that he was a proper representation for Packard and that his sales methods were not exactly ethical.

"Q. By the way, where was Schulte's place of business, do you recall? A. Well, he had two places of business really. He had one on old No. 1 Highway out in, I believe—I don't remember the street address, but it was over on—was it Wilkins—Wilkins Boulevard, and then he had another one on Edmonston Road, I believe.

"Q. With reference to Zell's ability to service that particular area, would you say that Schulte was coming into close competition with him with reference to any one of his places of business? A. Well, normally, no, he wouldn't, because he was serving an entirely different part of the city and of Baltimore County than Zell would serve. Zell was considered by us to be the downtown representation in Baltimore while Schulte was serving the outer area there.

"Q. I think you stated that you believed [950] that it was for the best interest of the factory to see to it that as many dealers were appointed in the Baltimore area as in your judgment you thought were necessary in order to take care of the Baltimore business. A. Well, that is correct. Of course, we had to weigh that always with the idea of not overloading the territory with dealers. I mean, we had to keep in mind the dealer's welfare as well as our own. We tried to strike a happy balance in the things so that Packard's interest and the dealer's would be adequately taken care of.

"Q. But you never thought only one dealer could take care of Baltimore? A. During the time I was zone manager of the Washington Zone, I never did."

I will omit down as far as the next to the last question on page 45.

"Q. Mr. Braden, there was a question that I wanted to clear up. Somewhere in your testimony and in reply to a question you mentioned Somerset Seafood Company. A. Yes.

"Q. Do you recall in what connection that was now, or how you happened to mention it, in regard to Webster Motor Company? [951] A. Yes, sir. In my first analysis of Webster Motor Car Company, from their financial statement, after I became zone manager, we found that there were other assets included in the financial statement of Webster Motor Car Company beside the motor car company itself. I made a trip to Baltimore and I talked to Mr. Richard Webster regarding it and found that the Webster Motor Car Company owned the Somerset Seafood Company and that it was being financed as a matter of fact through the Webster Motor Car Company. We objected to that on the part of the Packard because we felt it had nothing to do with the motor car company business and that it gave a warped picture in the true operation of that as far as the profits were concerned, and asked that it be taken out of the Webster Motor Car Company. Mr. Webster consulted with his attorneys and different people to advise him about the matter, and found that it was not possible or practical for him to take it completely out; but he did attempt to make a separation of it and show it in another manner on the statement and in connection with the Webster Motor Car Company than it was originally when I first discovered it.

[952] "Q. Do you recall what year that was? A. Well, I believe that was early in '46.

"Q. That was all done with full consultation with you and discussion with you? A. Oh, yes, definitely. It was a matter of mutual interest to us.

"Q. Whatever method was finally discovered by the attorneys and agreed to by Mr. Webster was given to you, and under all of the circumstances you considered that that would satisfy what otherwise was a confused picture of the financial statement? A. That is correct. And the thing that we wanted to prevent was further withdrawals of funds from the capital of Webster Motor Car Company to finance the Somerset Seafood Company. Other arrangements were made so that the capital of Webster Motor Car Company was not impaired, after this discussion, by the Somerset Seafood Company.

* * *

[953] "Q. Do you recall what the picture was in '51, April, '51 down through '52, '53, while you were still with Packard? A. Yes, sir. We had a surplus of automobiles. Zones generally throughout the country had cars in warehouse stock unsold to dealers.

* * *

"Q. 'In order that there will be no misunderstanding about the responsibility for the work you are contemplating, we wish to have it definitely agreed [954] that anything we do in connection with furnishing you with suggestions or advice will in no way affect the contractual relations as outlined in your Packard sales agreement. By this we mean

that we do not assume any responsibility and our suggestions, advice, plans, or blue prints do not contemplate that there is any change in the cancellation provisions contained in the said sales agreement.' Was it not this quotation, which I have just made from this questionnaire, that you recall became the subject matter of discussion between Donald Webster and Mr. French when you stated, as my recollection of your testimony is now, that in reply to the question put as to what was going to happen to the Webster Motor Car Company or its franchise if it went ahead and obligated itself to the expenditure of the amount of money required to do the work at hand, that you said in substance, that the Webster Motor Car Company had been a dealer for a good many years with the Packard Motor Company, and there is no reason why it shouldn't continue to do so? A. That is correct.

"Q. Is the address 1508 East Grand Boulevard, Box 117, Detroit 32, Michigan, the same address as the head office at the Packard Company? A. Yes, sir, that is the address."

[955] The Court: The next question was not answered.

Mr. Leahy: That was not answered. Now, down in the last part of page 54:

"The Witness: Well, I think that the performance of Packard Motor Car Company with respect to their dealers across the country is the best answer to that, that there were a number, a great number of Packard dealers who had a yearly contract, a contract that ran only for one year, that were renewed from year to year, and yet those same dealers were probably continually criticized for difficulties—

I mean for certain things in their operation which were not completely satisfactory and yet they were renewed from year to year by Packard. I think that is more or less common place throughout the whole industry.

"Q. To your knowledge, where the Packard Motor Car Company through its field buildings and real estate department had given assistance of the type and character which was given to the Webster Motor Car Company in this particular instance, and where the dealer, or in this instance, Webster Motor Car Company, had incurred heavy financial responsibilities after receiving this advice and assistance, isn't it a fact that those dealers were continued, to your knowledge, as dealers throughout the country? [956] A. Well, generally speaking that was true. I mean, this particular questionnaire that we have reference to, and that factor, carried no obligation on the part of the dealer to use the advice and the plans that we submitted to him any more than it carried an obligation on the part of Packard that if he did use it and found it unsatisfactory that he could come back on Packard for anything that was wrong. It was a mutual relationship, trying to help each other.

"Q. I was just about to ask that question. A. Yes, sir.

"Q. Wouldn't that follow out—— A. That is right.

"Q. —that that was the mutuality in the relationship between the dealer and the Packard Company? A. That was the intention and that was the practice of that operation."

Then I was to omit that balance of page 56, and on page 57 the half thereof, and beginning in the last portion of that. (Reading):——

"Q. Do you recall more particularly with regard to the discussions which you had with Mr. Zell and the Schulte dealership whether or not Mr. Beck was with you on those occasions or engaged in the discussions or was made known of them? [957] A. Well, he had knowledge of them. I don't know that he was with me on all cases on that, but I know he was in on the whole matter all the way through."

* * *

Mr. Denit: This is cross-examination by Mr. Smith. (Reading):——

* * *

[958] "Q. What was the reason for the termination of DeBaugh's dealership in 1948? A. The Packard Motor Car Company was short of automobiles and were not able to supply our dealers, that is, the dealers we had in the Washington Zone, with sufficient cars for them all to make a satisfactory profit; and we made an analysis of various areas throughout the country, throughout the zone, I should say, to determine what dealers could be temporarily done away with in order that the balance of the dealers could be more properly supported. It was decided that Towson was one of those spots, [959] under that emergency, that could be disbanded; and mutual cancellations were taken by going to each of the dealers in question and telling them what the situation was and saying, in effect,

'Well, now, we can all grow thin together or some of us can probably get a little fat on our bones; and from the standpoint of service, location and everything, it has been decided that you are one of the ones which we can temporarily do without.'

* * *

[961] "Q. What was the reason for the appointment of Schulte as a dealer? A. To secure better coverage of the territory, both sales and service-wise.

"Q. Will you explain what you mean by 'coverage of the territory'? A. Yes. Securing for Packard a more adequate share of the business, new car business, and providing the existing Packard owners with more satisfactory service.

"Q. At that time was Packard getting a percentage of price class in Baltimore equal to that in comparable metropolitan areas? A. I believe we were below the average for metropolitan areas in Baltimore. That is my recollection.

"Q. Was that a factor which went into the determination of the appointment of a new dealer? A. That would be one of the factors, yes, sir.

"Q. Wouldn't that be the principal factor? A. Not always. It would be a definite, very important factor in it, yes, sir, but there would be other things taken into consideration as well.

* * *

[962] "Q. Did Scott cease to be a dealer while you were zone manager? A. He did.

"Q. I show you what purports to be a letter dated March 9, 1950, from Will Scott, Inc. to Packard Motor Car Company, to your attention.

and ask you whether you received that letter. A. Yes, sir.

"Q. In this letter Will Scott, Inc. states: 'This letter will serve as formal notification to you that this company will terminate on March 31, 1950, the standard dealers sales agreement dated June 16, 1949 between Packard Motor Car Company and Will Scott, Inc. in accordance with the provisions of paragraph 17 of said agreement.' Did Scott's dealership terminate as of March 31, 1950? A. Yes, sir.

* * *

"Q. Was the Northwestern dealership terminated as of March 31, 1948? [963] A. I believe that is correct.

"Q. Was there any decision made as to whether Northwestern would be replaced by another dealer? A. Well, the matter was discussed, and I believe that some attempt was made to interest some prospects in that particular neighborhood, but we failed to find either the building or the prospect that could qualify.

"Q. Was there a decision made then that no new dealer would be appointed in Northwestern's place? A. As I recall it, we more or less let the matter lie dormant.

"Q. Did you discuss with other Baltimore dealers whether a new dealer should be appointed in the place of Northwestern? A. Yes, in this respect, that we discussed with them the fact that they were going out, as we also did in the case of Scott, and told them that that placed an additional responsibility

on them to secure for us as much business as we had been getting, or more, in the future.

* * *

[965] "Q. Did you make any statement to them as to the reason for the termination of Northwestern or Scott? A. No, sir, we did not, as I recall it; other than the fact that since they were out this gave them a finer opportunity to get more business for themselves. As to the individual reasons, we didn't go into that with the other dealers.

"Q. What purpose did you have in Packard's interest in discussing this with other Baltimore dealers? A. To promote more Packard business within the area with those particular dealers that remained.

"Q. You mean promote more sales of Packard cars in Baltimore? A. Yes, sir. At that time, I would like to make clear for the record, too, we pointed out to them that we would like to continue with that arrangement, but that the matter was entirely in their hands; that if they failed to secure for us a satisfactory volume of business, we would probably be forced to go back for additional dealers in the area. That was very clearly stated.

"Q. How would you determine whether what they produced was satisfactory? A. Percentage of price class.

[966] "Q. Can you explain that a little more clearly? A. Yes. That is Packard's percentage or share of the cars sold that were sold at or around Packard's retail prices. Roughly, that would cover the following makes of cars: Packard, Buick, Mercury, Lincoln, Cadillac, Chrysler, the Oldsmobile

'8' at that time. There might have been some others, but I think that will explain it.

* * *

[968] "Q. When Packard increased or decreased the number of dealers in Baltimore, was Packard's [969] percentage of price class in Baltimore a factor which went into its determination? A. Yes, sir.

"Q. Was it the principal factor? "A. I am just trying to think through this thing for an answer to this. I would say that it was one of the principal factors, yes, sir.

"Q. I assume that Packard's primary objective is to sell as many of its products as possible? A. And still be able to maintain a sound dealer organization. You see, if I may be permitted this statement, my interpretation of the application of price class to a dealer organization would be this, that price class is only one of the factors; and price class alone could be very unfair because you could have a competitive situation, a Chrysler group of dealers, shall we say, who for some reason would go out and overtrade and sell a tremendous number of automobiles, making it impossible for Packard dealers to profitably sell their cars. Consequently, Packard would show a poor percentage of price class; and perhaps, even in the face of that unfair competition, would do a satisfactory job. So that in considering price class, you have to also consider the competitive situation in the area. You also have to consider the profit necessary for [970] dealers to survive and to make a reasonable return on their investment.

"Q. Why was the ability of dealers to survive and make a reasonable return on their investment of importance to Packard? A. Well, because of, as I said in my earlier testimony, it has been very expensive to change dealers, and Packard desired to build a stable dealer organziation with as little turnover as possible.

"Q. It is important to Packard to have strong dealers, isn't it? A. Definitely, yes, sir.

"Q. Why is it important to Packard? A. Well, it is very important because we deal with the public and the public likes to deal with a reliable, sound organization, whether they are buying automobiles or bonds.

"Q. Isn't it also because strong dealers are better able to compete with other makes than are weak dealers? A. Oh, certainly.

"Q. And your primary objective, or one of your primary objectives, is to compete as effectively as possible with other makes? A. That's correct.

* * *

[974] "Q. After the fire in 1949, did you advise Webster to acquire the property? A. Only as I testified before, I believe, that if they considered it a sound investment from a real estate standpoint and felt that they had sufficient to do with it without the investment they had in the business, then it would be perfectly satisfactory so far as Packard was concerned.

"Q. Didn't you tell them that the decision as to whether to buy the property was a decision they had to make themselves? A. That is right.

"Q. Do you know whether Webster had any advice from any other source on whether to buy the property? A. Well, it's my impression that he did.

"Q. Did he ever tell you? A. I can't recall definitely. But it seems to me that he told me that he had discussed it with his banker and with—I don't just remember who, but, as I [975] say, I have the impression that he did discuss the matter with other people.

"Q. I believe you testified that when you discussed with Webster the acquisition of the property, your interest was that if Webster were going to continue as a dealer the dealership be on a sound financial basis. Is that correct? A. That is correct.

"Q. Isn't that the same interest that you had in discussion with a prospective dealer before he was appointed when you discussed with him the setting up of his organization and facilities? A. Oh, yes.

* * *

"Q. Mr. Braden, I am going to read to you two sentences from Paragraph 54 of the complaint: 'In November, 1949 fire completely destroyed Webster's place of business at 4410-4420 York Road, Baltimore, Maryland. Packard acting through Mr. Samuel Braden (Packard's then zone manager), the defendant Beck and others urged Mr. Webster to buy the land on which the building had been located, and there erect new and improved buildings specially designed for Packard sales room, repair shop, used car lot, etc.' [976] I also wish to read from Mr. Donald Webster's testimony at page 307 of his deposition:, 'Even though Mr. Beck and Mr. Braden recommended personally that we try to buy the

property and rebuild it according to improved lines and improved features for a Packard dealership, we looked about to see whether any other places were available for rental, and we looked at two or three places, but the soundness of the advice given us by Mr. Beck and Mr. Braden—I don't recall whether any other zone officials took part in these discussions or not—but the soundness of their advice struck home in our judgment, and we began negotiating with the owners of the property to try to buy it.' Did you urge or recommend that Webster buy the property? A. Let us put it this way: At that time we were reluctant to see Webster go out of business as a Packard dealer. What you read me there last was true, that they did make other search for property in nearby neighborhoods and around there, and were unable to come up with anything. We pointed out to them the fact that they had been established in that particular location and it would be of benefit, if they were to continue the business, for them to remain in that location. And, again, as far as the purchase of the real [977] estate was concerned, there was a lot of discussion entered into as to whether or not it was sound from a business standpoint. And on the basis that it was sound and that it was a good investment, we then urged them to go ahead on that basis.

"Q. Well, on the basis of whose judgment as to whether it was sound or a good investment? A. Theirs.

"Q. Whose? A. Theirs.

"Q. Did you urge Webster to buy the property? A. No, I don't recall that we urged him to, other

than on the basis that I have explained to you. We did not pose as real estate experts. We had no knowledge of the value of property in Baltimore.

"Q. Did any other representative of Packard, to you knowledge, urge that Webster buy the property? A. Not other than as I have testified.

"Q. Did you urge Webster to erect a new building? A. If he was going to remain a dealer, he had to erect a building or do something to get satisfactory quarters, and so we did urge him to do that.

"Q. You urged him to put up a new building? A. No. I said we urged him to get satisfactory [978] quarters to house the Packard franchise in.

"Q. Did any other representative of Packard, to your knowledge, urge Webster to erect a new building? A. Not other than as I have stated before, that I know of.

"Q. Did you have any discussion with any representative of Webster on the tax benefits which might be derived by Webster Motor Car Company from leasing the property rather than owning it? A. Other than a suggestion that they should look into the thing and get expert advice on it; we did not pose as tax experts either, and no one of us made any recommendation regarding that because we were not tax experts. But we did, I am quite sure, suggest that they get competent advice on the matter.

"Q. Did you advise Webster to take a ten-year lease? A. I don't recall that we did, no, sir. I don't believe that matter was ever discussed with us.

"Q. You have no recollection of discussing the term of the lease? A. I don't recall that we discussed the length of time that the lease should be made.

"Q. Did any other representative of Packard, to your knowledge, advise a ten-year lease? [979] A. I wouldn't know of anything. I don't know of anything like that.

"Q. Did you advise that Webster take a lease of any particular duration? A. As I recall it, I don't believe that matter came under discussion, although I wouldn't say positively that it didn't, because it was a family proposition anyway; since Webster's interests owned the building and also owned the business, that was a matter for them to determine within themselves.

* * *

[981] Q. Did you have any authority to give Webster any assurance as to the continuation of the dealership in the future? A. No, sir. The contract, of course, was the best evidence, from the legal standpoint, of what he could expect on that.

* * *

[982] "Q. Did you ever have any instructions from your superiors on giving oral assurances to dealers as to continuation of the dealership? A. No; instructions, no. But it was generally indulged in by the president on down. We took great pride in pointing to the length of time that many people had been our dealers throughout the United States. We issued printed bulletins showing the length of service of many dealers, as well as employees, of Packard at that time.

"Q. At the time of your discussions with representatives of Webster Motor Car Company following the fire what was your understanding as to your authority with respect to giving oral assurances of

continuation of the dealership? A. I had no authority whatsoever. No one in Packard did.

"Q. Had any such authority? A. No, sir.

"Q. Did you intend to give Webster any such assurance? A. Other than what I have stated in previous testimony, no.

"Q. Did you intend to lead any representative of Webster Motor Car Company to believe or expect [983] that Webster's dealer's sales agreement would be renewed from year to year for the duration of the lease? A. Nothing specific insofar as the lease is concerned. I think all of us definitely gave them the impression that they probably would continue to be Packard dealers as long as they continued to do the kind of a job that they had done for Packard.

"Q. Well, did you intend to lead them to believe that they would be renewed from year to year for any specific period? A. No, sir.

"Q. In any discussions with any representative of Webster Motor Car Company following the fire, did any such representative ever say anything to you indicating a belief or expectation that Webster's dealer's sales agreement would be renewed from year to year for the duration of the ten-year lease? A. Not to my knowledge.

"Q. Or for any specific period? A. No; other than as I have stated before, that I don't think any thought ever entered either of our minds that they probably wouldn't continue to be a dealer.

"Q. In any discussions which you had with any representative of Webster Motor Car Company following [984] the fire, was there any connection indicated between the lease and its terms and the continuation of the Webster dealership? A. No, sir.

"Q. I believe you testified that you told Donald Webster that as long as a dealer continued to be satisfactory there was no reason to believe that he would not be continued. Is that your recollection? A. I think I made some remark, generally speaking, in that respect, yes, sir.

"Q. Isn't that the same sort of statement that you generally made to prospective dealers before their appointment when they raised the question of security? A. That's right. You would not be able to sell a Packard franchise to anybody and ask him to make an investment of 50 or 75 or a hundred thousand dollars with the idea that he was going to be in business for only a year. You couldn't sell a franchise to anybody on that basis.

"Q. Do you mean by that, then, that you committed the company to continue him for more than a year? A. We never committed the company to anything that was not in writing. But, as I have said before, we [985] pointed to so many examples of where the longevity of Packard dealers was the best proof of what our policy was that it could not be doubted.

"Q. When you made such statement to prospective dealers, it was not your intention, was it, to give the dealer any right to continuation beyond the term specified in the agreement? A. Certainly not. I had no authority to do that.

"Q. And when you made a similar statement to a representative of Webster, it was not your intention, was it, to give Webster the right to continuation beyond the term specified in his agreement? A. No, sir.

"Q. As far as you know, did any representative of Webster think that you were giving Webster a right to continuation beyond the term specified in the agreement? A. I don't know.

* * *

[987] "Q. When Packard decides to have a multiple dealership in a particular area rather than a single dealership, is not its decision primarily for the purpose of getting the maximum percentage of price class in that area? A. Well, yes, to generally develop better Packard business in the area. Price class would be an important part of it.

"Q. And the principal factor which goes into the determination of whether it should be a single or multiple dealership would be Packard's estimate as to which method is the best method to obtain the desired percentage of price class. Isn't that correct? A. Well, it would be Packard's decision, whether it would be right or wrong, as to that. I say, there are so many factors that enter into that thing that no one in Packard is in complete control of a situation like that. It is determined to some extent by what competitive dealers are established in that area. Obviously Packard could not compete very satisfactorily in an area if competition had many dealers in that particular area located around when Packard had a lesser number or one dealer or something like that. So the competitive factor would enter into it, too. The [988] matter of service to customers, the location of dealers making service available to customers, and so forth, would enter into the thing, too. There are many things that go into an analysis before a multiple area is set up.

"Q. In making a decision as to whether it should be a single or multiple dealership area, Packard's decision as to which would be the best way to sell Packard cars would be the paramount factor. Isn't that right? A. Definitely, certainly. I mean, they make their decisions.

"Q. And Packard's primary objective in any area is to sell more of its products. Isn't that right? A. That would be a natural assumption, yes, sir.

"Q. And the primary factor considered in deciding what kind of distribution it should have in a particular area would be its own decision as to which would be the best way to sell more of its products. Isn't that correct? A. Well, since they control the placing of franchises, obviously they would have that right to make that decision.

[989] "Q. I believe that you testified this morning that the purpose of the multiple dealership system, or multiple dealership, in a particular area was to establish competition among Packard dealers for the benefit of the public. A. That's right.

"Q. If Packard decides to do that, though, is it not because Packard feels that in that way it will sell more Packards? A. Well, that is in the back of the whole thing, yes, sir.

"Q. And it also is interested in selling more Packards in competition with other makes? A. That's right.

"Q. And the better competition Packard provides as against other makes, the greater benefit is conferred upon the public. Isn't that right? A. That's correct.

"Q. The public benefits by Packard's effective competition in its price class. Isn't that so? A. Yes, sir, I would think so.

"Q. Now, isn't the benefit which the public derives from effective competition by Packard with other makes of more importance to the public than [990] the benefit of competition among Packard dealers? A. Yes, it's of more importance, certainly. However, I don't think that the competition among Packard dealers can be overlooked completely, because we can't look at this problem strictly from a sales standpoint alone. You have to look at it from the standpoint of the service you render on your product after you sell it, and it's a long-range proposition.

* * *

[991] "Q. Were you aware of the fact that Richard Webster was spending a great deal of his time on the seafood business rather than the motor business? A. Yes, sir.

"Q. Did you complain about that to him? A. Yes, sir.

"Q. Will you tell me what you can recall of your discussions with him about that? A. Well, in the beginning of the thing Richard Webster was still the general manager of the Webster Motor Car Company; and because of that, any contacts that we made to get a decision or to get an order for automobiles had to await such time as we could contact him. That became very unsatisfactory and we discussed the matter with Mr. Webster, and told him that if he was not going to be able to devote the time to the automobile business that we felt he should, he should certainly then appoint somebody with constituted authority to conduct the business of the Webster Motor Car Company, in so far as Packard was concerned.

"Q. Did he appoint someone else to conduct the business? A. Yes, sir, he did.

"Q. And after that did he fail to participate in the business? [992] A. He was always there, I mean, he was available for advice and so forth and I believe consulted with Mr. French, who was appointed his general manager at that time. But Mr. French, as far as we were concerned, was the manager of the business and did handle it.

* * *

"Q. Did his sales force have a tendency to wait for customers to come in who already decided [993] they wanted Packards instead of going out after customers in competition with other makes? A. Well, no. I think that actually most of the time he had a sales force there which would be as good as any in Baltimore, I mean, capable men and aggressive men. The very nature of automobile salesmen is that they are inclined to like to remain in their chairs too much unless somebody pushes them out more or less. I think that, as far as outside solicitation is concerned, they were probably as aggressive as any other organization in Baltimore.

* * *

[994] Mr. Denit: May we read at this time, if Your Honor please, certain portions of the direct which were omitted?

The Court: You may proceed.

* * *

[995] "Q. I was interested in one bit of information you gave us with regard to 1945. I think that was the year you came in as zone manager here? A. Yes, sir.

"Q. And you said that it was really a second-hand business that you were carrying on, selling used cars? A. That is correct.

"Q. How long did that condition exist that the restrictions either due to war or imposed by the Government were such that you couldn't manufacture new Packards? A. Well, we started manufacturing cars in 1946. Production was very disappointing during all of 1946. We started out with big plans and we were going to build, I believe, some 200,000 cars and, as I recall it, ended up building something like 46,000 cars in that year.

"Q. How did it from that time on progress? A. The next year was not too much better. [996] We were still under Government restrictions as to materials, and so forth, and our production was not at all satisfactory in 1947. 1948 improved, and 1949 was somewhat better. It wasn't really until 1950 that we began to build all the cars that we could sell."

* * *

Mr. Leahy: There was one answer which was on page 81 which was not read of the cross examination which I would like to read, and in order to get the full import of the answer it would be necessary for us to read the previous question on page 80.

The Court: Very well.

Mr. Leahy (reading):

"Q. I am going to read from page 410 of Mr. Donald Webster's testimony on deposition: [997] 'I considered that we had an agreement'"——

Mr. Denit: Just a moment. Your Honor, that is the portion you ruled out.

Mr. Leahy: I will omit that and get the question.

(Reading:)

"In any discussion with any representative of the Webster Motor Car Company that you had following the fire, did you make any agreement or modification or arrive at any meeting of minds between Webster Motor Car Company and Packard that Webster's sales agreement would be renewed for any period?"

Mr. Denit: That also is part that Your Honor said we should not read.

Mr. Leahy: Oh, no.

The Court: At the Court's suggestion you omitted, and Mr. Leahy omitted, the quotation from Donald Webster's testimony, but I think the next question and answer are admissible.

[998] Mr. Denit: Those are portions which Your Honor told me not to read.

Mr. Leahy: I didn't so understand Your Honor.

Mr. Denit: I began to read on page 81 with the question, "Did you have any instructions from your superiors"——

The Court: I suggested that you don't read the quotation from Donald Webster's deposition.

Mr. Leahy: That is right.

The Court: And even that was not a ruling or an instruction; that was a suggestion which you acquiesced in, and which Mr. Leahy is likewise following. You may proceed.

Mr. Leahy: The answer was: (reading)—

"A. No, sir. There was, I think, good reason for Donald Webster feeling as he did because at the time that this happened there was no thought in the

minds of either the officials in Detroit or of the local zone that Webster would not continue on and on and on as a Packard dealer."

Now, beginning with "Further examination by counsel for plaintiffs," which begins at page 91, I was going to omit a short portion on page 91; pages 92, 93, 94, and only one question and answer on page 95, and that is about the beginning of the last third of page 95. (Reading):—

"Q. And there isn't any question but what [999] the Packard officers and the Packard Company had at that time great confidence in Mr. Webster. Isn't that true? A. They did."

I will omit the rest; I will omit page 96. On page 97, beginning at the break in the page where it says, "By Mr. Leahy," just the two questions: (Reading):—

"Q. Now, at the time you were having these talks with Webster, whether it was Mr. Webster or Don Webster or French, did any one of you, so far as you know, ever have in your mind that the contract would be terminated at the end of the term? A. No, sir.

"Q. It didn't come into the thought of anybody, did it? A. No, sir."

Then omitting, and beginning again at the bottom of page 98; (reading):—

"Q. And wasn't it within your own expectation that if this building were rebuilt and if these obligations were incurred and if Webster continued on in the dealership the renewals would be continued as they had been in the past and as you had known they had been in other instances? [1000] A. Yes, sir."

On page 99, one question: (Reading):—

"Q. Well, in your experience had you ever known of a renewal being denied a dealer who desired to remain in business where there was no reasonable ground for the refusal of the renewal? A. I don't recall any such instance as that."

I believe that is all I care to bring to the attention of the jury, if Your Honor please.

* * *

[1010] RULING ON DEFENDANTS' MOTION FOR A DIRECTED VERDICT

The Court: The rule that must govern the disposition of a motion for a directed verdict at the end of plaintiff's case was set forth by the Court of Appeals in Baltimore & Ohio Railroad v. Poscom, 85 Appeals D. C., 207, in which I had occasion to write the opinion as I was temporarily sitting in the Court of Appeals at that time. The rules are really elementary, that if substantial evidence is presented, which credited would sustain a verdict in favor of one party or the other, the case should be left for the jury. Further, that the trial court, on a motion for a directed verdict, must view the evidence from the standpoint most favorable to the adverse party. There is no doubt in the Court's mind that the Packard Motor Car Company—any manufacturer, any wholesaler or dealer in any commodity—has the right to pick and choose his customers; has a right to refuse to sell to one

and to sell to another. A manufacturer or a wholesaler has the right to select one dealer, or a half dozen dealers, or more, in a particular area, provided he acts as a matter of business judgment free from compulsion and without ulterior motives. This rule is very well set forth by Judge Freed in G & F Amusement Company v. Regent Theatre Company, 107 Federal Supplement, 453, in the Northern District of Ohio, at page 463, where he says:

[1011] "The opportunity of a business entity, when acting without ulterior motives and free from compulsion, to sell its product to one potential customer in preference to another, exemplifies precisely the type of economic system upon which American business thrives."

His decision was affirmed in a per curiam opinion by the Court of Appeals for the Sixth Circuit in 216 Fed. (2d) 749. The purpose of the Sherman Act, or one of the purposes, of course, is to preserve the American system of free enterprise so well described in that sentence by Judge Freed, but the purpose of the Sherman Act also is to prevent interference with competition by agreements in restraint of trade, or agreements tending to create a monopoly. I use the word "agreement" rather than "conspiracy" because the word "conspiracy" as used in the Sherman Act does not involve any element of opprobrium. That is what the word "conspiracy" implies in popular parlance. A conspiracy in the eyes of the law is merely an agreement to do something that the law forbids; in other words, an agreement in restraint of trade, or an agreement to create a monopoly. That is an

interference with competition. Now, if Zell had got his competitors out of the way over a period of years by outselling them, or by giving better service, or in some other way, and had acquired a monopoly in [1012] that manner, that would be a perfectly lawful monopoly because it would have resulted from free competition. Here, however—and again, I have to construe the evidence from the standpoint most favorable to the plaintiffs—we have an agreement entered into between Zell and Packard whereby the parties to the agreement undertake to drive all the other Packard dealers in the area out of business, and give a monopoly of dealing in Packard cars in the area to Zell. Now, the mere fact that Packard may have been acting from perfectly proper motives of self-interest is immaterial, because malevolence is not required as an element of violation of the Sherman Act. The Sherman Act was described one time as merely a traffic regulation for commerce, and not a law dealing with violations involving moral turpitude. The Court is of the opinion that the jury would have a right to find on this evidence—and that is a jury question—that such an unlawful conspiracy was entered into and that as a result of that unlawful conspiracy the plaintiffs' business was completely destroyed. Therefore, of course, he was obviously injured by the conspiracy. Now, as to the element of restraint of interstate commerce: The Court agrees with counsel for the defendant that it must be shown, under the authorities, that the public interest is involved. I think there is prima facie evidence from which the jury would

have a right to draw the inference [1013] that the public interest is affected by the agreement here involved, in that the public benefits by competition between dealers. In that manner they may get better service, better terms on exchange of used cars for new cars, and so forth. The Court is of the opinion that the jury would have a right to find that this agreement affects interstate commerce because while it does not affect the number of cars that are being transported from Detroit to Baltimore, say, or from Washington to Baltimore, the concept of interstate commerce is not so limited. The actual sale of cars is part of that interstate commerce. This is best demonstrated by what might be called the motion picture cases under the Sherman Act. In the motion picture cases a person who operated one theatre in one particular town has been allowed to recover damages under the Sherman Act even though he personally wasn't engaged in interstate commerce but because the defendants were shipping motion picture films say from Hollywood to Baltimore, or from Hollywood to New York, and the furnishing of those films to a theatre in a particular locality was deemed to be part of the interstate commerce, and that the chain of interstate commerce did not end until the film was furnished to the theatre. So here it might well be said that the chain of interstate commerce doesn't end until the car is supplied to [1014] the dealer, or even perhaps to the ultimate consumer. The Court is of the opinion that there is substantial evidence from which the jury would have a right to find a verdict in favor of the plaintiff as against the

defendants, Packard Motor Car Company, Marshall Beck, and C. M. Porter. The Court is of the opinion, however, that it has not been shown that Samuel Howell participated in the conspiracy in any other manner than as a spectator. Accordingly the motion for a directed verdict in behalf of the defendants, Packard Motor Car Company, Marshall Beck, and C. M. Porter is denied. The motion for a directed verdict as to defendant Samuel Howell is granted.

* * *

[1018] Mr. Denit: We have a stipulation with respect to certain statistical information that we would like to have approved.

* * *

[1019] "It is hereby stipulated by the parties that the Automotive Trade Association of Maryland is an automobile trade association which, among other things, gathers statistical information from official records in the state of Maryland. The publications and compilations of the Automotive Trade Association of Maryland are recognized and relied on for the information contained therein by the automobile industry of Maryland. Bound volumes initialed by counsel pursuant to the stipulation are the bound file copies of the daily report of new cars first titled in 1952 and 1953 in Baltimore City and the Western Shore counties of Maryland, including Baltimore and Howard Counties, and are recognized publications of the Automotive Trade Association of Maryland relied on by the automobile industry for the

facts shown therein. The tabulation initialed by counsel pursuant to the stipulation and identified as Exhibit 18 on the deposition of Sidney Zell, is also a copy of a recognized publication of the Automotive Trade Association of Maryland relied on by the automobile industry in [1020] Maryland for the facts shown therein."

Mr. Smith: We have another stipulation to propose. We haven't had an opportunity yet to show it to plaintiffs' counsel. It would be something to this effect. Records which purport to be Packard dealers' financial statements received by and in the files of Packard shall be admissible under 28 U. S. C. A. Section 1732 as records made in the regular course of business without testimony as to the making or the accuracy thereof. I will explain why we propose that stipulation. We have some tabulations based upon financial statements, dealers' statements, submitted by some 25 or 30 dealers, which we intend to offer for the purpose of proving certain financial facts which they have reported to the company. We wish to obviate the necessity of calling someone from each of those dealers to testify to authenticate the dealers' statements.

The Court: Oh, I certainly would not want that burden imposed. Certainly I wouldn't want the time of the Court taken with that. You can reserve your rights if you want to.

Mr. Leahy: Yes.

The Court: As to relevancy and competency, but waive formal proof. Will you do that?

Mr. Leahy: I will do that, yes.

VOL.

II

No. [redacted]
213

JOINT APPENDIX

Office Supreme Court, U.S.
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JUN 21 1957
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1956

No. 13,152

PACKARD MOTOR CAR COMPANY, ET AL.,
Appellants,

v.

THE WEBSTER MOTOR CAR COMPANY,
Appellee.

No. 13,153

THE WEBSTER MOTOR CAR COMPANY,
Appellant,

v.

PACKARD MOTOR CAR COMPANY, ET AL.,
Appellees.

Appeals from the United States District Court
for the District of Columbia

Volume II

(Pages 472 to 964)

INDEX

	PAGE
Complaint	1
Answer	30
Plaintiffs' Interrogatories	53
Answers to Interrogatories	64
Stipulation of Facts	76
Plaintiff's Motion for a Directed Verdict	80
Plaintiff's Requested Instructions	81
Defendants' Requested Instructions	86
Statement of Counsel as to Services Rendered	94
Opposition to Application for Attorneys' Fee	112
Affidavit in Support of Application for Attorneys' Fee	116
Verdict and Judgment	118
Order Allowing Attorneys' Fee	119
Motion for Judgment Notwithstanding the Verdict Under Rule 50(b)	119
Motion for New Trial	122
Affidavit in Support of Defendants' Motion for a New Trial	128
Opinion Denying Motions	136
Order Overruling Motion for New Trial	149
Notice of Appeal (Packard)	149
Notice of Appeal (Webster)	150
Designation of Contents of Record on Appeal	151
Order for Transmission of Original Record	151

PAGE

Impaneling of Jury 154

Opening Statement on Behalf of Defendants 155

Ruling on Motion for a Directed Verdict at End of Plaintiffs' Case 466

Ruling on Defendants' Motion for a Directed Verdict at End of Whole Case 837

Opening Argument on Behalf of the Plaintiffs 847

Argument on Behalf of the Defendants 881

Argument in Rebuttal on Behalf of the Plaintiffs ... 923

Charge to the Jury 936

Verdict 959

Opinion on Application for Attorneys' Fee 962

PLAINTIFF'S WITNESSES:

Richard C. Webster:

Direct 163

Cross 213

Deposition of Marshall G. Beck:

Direct 254

Cross 308

Redirect 311

Franklin DeBaugh, Jr.:

Direct 322

Cross 332

Redirect 334

Recross 336

John Wesley Ward:

Direct 336

PAGE

Harry L. French:
Direct 337
Cross 355
Redirect 374
Recross 377

James M. Fincham:
Direct 378
Cross 413
Redirect 427

Deposition of Samuel D. Braden:
Direct 428
Cross 447
Redirect 464

DEFENDANTS' WITNESSES:

Clare E. Briggs:
Direct 472
Cross 494
Redirect 556

Roy Abernethy:
Direct 557
Cross 580
Redirect 625

Donald Dent Webster:
Direct 628

Thomas V. Maloney:
Direct 668

Robert W. Russell:
Direct 671
Cross 675
Redirect 684
Recross 685

PAGE

Francis L. Armstrong:
Direct 686
Cross 706
Redirect 759

J. Howard Ertsgaard:
Direct 761
Cross 767
Redirect 773
Recross 774

John H. Verkouteren:
Direct 777
Cross 804

Walter F. Miller:
Direct 808
Cross 825
Redirect 831
Recross 831
Re-Redirect 832

PLAINTIFF'S EXHIBITS:

Plaintiff's Exhibit 6—Dealer's Sales Agreement (Webster) 965

Plaintiff's Exhibit 9—Letter 2 14 52 Beck to Webster 968

Plaintiff's Exhibit 10—Letter 2 20 52 Webster to Beck 969

Plaintiff's Exhibit 11—Letter 3/9/52 Webster to Beck 972

Plaintiff's Exhibit 18—Letter 6/4/52 Beck to Webster 976

Plaintiff's Exhibit 20—Letter 6/11/52 Leahy to Beck 977

PAGE

Plaintiff's Exhibit 21—Letter 6/11/52 Beck to Leahy 979

Plaintiff's Exhibit 22—1952-53 Amendment to Dealer's Sales Agreement 980

Plaintiff's Exhibit 23—Lease between Somerset and Webster 986

Plaintiff's Exhibit 25—Letter 7/29/53 Leahy to Barker 989

Plaintiff's Exhibit 27—Letter 3/10/52 French to Packard 991

Plaintiff's Exhibit 29—Letter 1/2/52 Beck to McGill 992

Plaintiff's Exhibit 29a—Mutual Cancellation Agreement (Schulte) 993

Plaintiff's Exhibit 30—Letter 7/19/51 Zell to Beck .. 994

Plaintiff's Exhibit 31—Dealer Contact Report 9/20/51 995

Plaintiff's Exhibit 32—Letter 1/11/52 Zell to Beck. 996

Plaintiff's Exhibit 33—Letter 2/13/52 Zell to Briggs 997

Plaintiff's Exhibit 35—Dealer Contact Report 3/18/52 998

Plaintiff's Exhibit 36—Dealer Contact Report 3/20/52 998

Plaintiff's Exhibit 37—Letter 3/21/52 Zell to Fenn. 999

Plaintiff's Exhibit 38—Letter 3/26/52 Beck to McGill 1001

Plaintiff's Exhibit 40—Letter 4/15/52 Leahy to Beck 1002

Plaintiff's Exhibit 41—Letter 5/14/52 Zell to Briggs 1003

PAGE

Plaintiff's Exhibit 42—Memorandum 6/10/52 Armstrong to Briggs 1004

Plaintiff's Exhibit 43—Memorandum 7/8/52 Tierney to All Departments 1005

Plaintiff's Exhibit 44—Dealer Contact Report 9/27/51 1006

Plaintiff's Exhibit 46—Receipt 5/20/52 1007

Plaintiff's Exhibit 47—Letter 6/18/52 Beck to McGill 1007

Plaintiff's Exhibit 48—Letter 3/3/52 Beck to Abernethy 1009

Plaintiff's Exhibit 49—Letter 6/16/49 Braden to Zell 1011

Plaintiff's Exhibit 54—Dealer Contact Report 10/2/52 1012

Plaintiff's Exhibit 55—Letter 9/22/52 Proctor to Beck 1013

Plaintiff's Exhibit 57—Letter 9/23/52 Beck to Proctor 1014

Plaintiff's Exhibit 58—Memorandum 9/24/52 Porter to Beck 1015

Plaintiff's Exhibit 64—Dealer Contact Report 4/18/52 1016

Plaintiff's Exhibit 65—Dealer Contact Report 4/22/52 1016

Plaintiff's Exhibit 68

Schedule I 1017

Schedule I-A 1018

Plaintiff's Exhibit 69

Schedule II 1019

Schedule III 1020

PAGE

Plaintiff's Exhibit 70
Schedule IV 1021
Schedule V 1022

Plaintiff's Exhibit 71
Schedule VI 1023
Schedule VII 1024

Plaintiff's Exhibit 72—Summary of Losses 1025

Plaintiff's Exhibit 80—Advertisements 1026

Plaintiff's Exhibit 84—Telegram, Beck to McNalley .. 1030

Plaintiff's Exhibit 86—Dealer Contact Report 6/11/52 1030

Plaintiff's Exhibit 88—Dealer Contact Report 6/9/52 1031

Plaintiff's Exhibit 90—Letter 6/2/52 Beck to McGill . 1032

Plaintiff's Exhibit 91—Letter 5/27/52 Beck to Abernethy 1033

Plaintiff's Exhibit 92—Packard Organization Chart .. 1038

Plaintiff's Exhibit 93—Letter 5/7/52 Beck to Abernethy 1039

Plaintiff's Exhibit 94—Dealer Standing Report 1041

Plaintiff's Exhibit 95—Letter 4/23/52 Beck to Abernethy 1042

Plaintiff's Exhibit 96—Dealer Contact Report 4/21/52 1043

Plaintiff's Exhibit 98—Memorandum 4/18/52 Fenn to Briggs 1044

Plaintiff's Exhibit 99—Dealer Contact Report 4/18/52 1045

Plaintiff's Exhibit 100—Letter 4/7/52 Beck to Abernethy 1045

PAGE

Plaintiff's Exhibit 105—Letter 3/31/52 Beck to Abernethy 1047

Plaintiff's Exhibit 106—Dealer Contact Report 3/28/52 1048

Plaintiff's Exhibit 107—Dealer Contact Report 3/27/52 1049

Plaintiff's Exhibit 109—Letter 3/4/52 Beck to DeBaugh 1050

Plaintiff's Exhibit 110—Memorandum 3/1/52 Armstrong to Abernethy 1051

Plaintiff's Exhibit 113—Letter 3/15/51 Osband to Dealers 1052

Plaintiff's Exhibit 122 for Identification—Letter 8/31/38 Webster & Machen to Zell 1053

Plaintiff's Exhibit 124—Advertisements 1055

Plaintiff's Exhibit 128—Letter 2/11/52 Porter to Zell. 1056

Plaintiff's Exhibit 129—Miscellaneous Correspondence 1058

Plaintiff's Exhibit 131—Summary of Losses (discounted) 1067

DEFENDANTS' EXHIBITS:

Defendants' Exhibit 1—Letter 3/4/50 Webster to Braden 1068

Defendants' Exhibit 2—Questionnaire 11/30/49 1071

Defendants' Exhibit 10—Letter 4/9/52 French to Packard 1072

Defendants' Exhibit 15—Letter 6/13/51 Platfoot to Briggs 1073

Defendants' Exhibit 16—Letter 1/2/52 Marnocha to Schroeder 1075

PAGE

Defendants' Exhibit 16A—Chart 155 9/3/51 1078

Defendants' Exhibit 17—Memorandum 9/24/51 Platfoot to Briggs 1080

Defendants' Exhibit 20—Letter 12/14/51 Schulte to Beck 1085

Defendants' Exhibit 22—Letter 2/26/54 Webster to Abernethy 1086

Defendants' Exhibit 24—Memorandum 3/1/52 (Donald D. Webster) 1088

Defendants' Exhibit 25B—Consent Order in Maryland Action 1090

Defendants' Exhibit 25C—Motion to Vacate Consent Order in Maryland Action 1092

Defendants' Exhibit 25D—Order Denying Motion to Vacate in Maryland Action 1094

Defendants' Exhibit 25E—Pre-Trial Transcript 1095

Defendants' Exhibit 25F—Transcript on Motion in Maryland Action 1098

Defendants' Exhibit 26—Tabulation of Packard's Price-Class Performance 1131

Defendants' Exhibit 30—Letter 3/9/50 Scott to Packard 1132

Defendants' Exhibit 31—Dealer Contact Reports 7/21/50 and 4/20,21/50 1133

Defendants' Exhibit 37—Dealer's Sales Agreement (Zell) 1136

Defendants' Exhibit 39—Sales Activity Reports (Webster) 1141

Defendants' Exhibit 41—Retail Quota Notice (Webster) 1142

PAGE

Defendants' Exhibit 42—Advertisements 1143

Defendants' Exhibit 44—Letter 5/29/52 Crane to Dunphy 1145

Defendants' Exhibit 45—Letter 5/29/52 Crane to French 1146

Defendants' Exhibit 48—Memorandum 12/27/51 (Beck) 1147

Defendants' Exhibit 49—Dealer Sales Agreement Termination Notice (Schulte) 1148

Defendants' Exhibit 50—Letter 1/3/52 Howell to Ulaga 1149

Defendants' Exhibit 51—Memorandum 3/26/52 (Beck) 1150

Defendants' Exhibit 55—Dealer Sales Agreement Termination Notice (DeBaugh) 1151

Defendants' Exhibit 56—Memorandum 6/17/52 (Beck) 1152

Defendants' Exhibit 59—Dealer Sales Agreement Termination Notice (Webster) 1153

Defendants' Exhibit 60—Letter 6/18/52 Howell to Ulaga 1154

Defendants' Exhibit 62A—Data Respecting Eastern Dealers—1950 1156

Defendants' Exhibit 62B—Data Respecting Eastern Dealers—1951 1157

Defendants' Exhibit 62C—Data Respecting Eastern Dealers—1952 1158

Defendants' Exhibit 62D—Data Respecting Eastern Dealers—1953 1159

Defendants' Exhibit 62E—Data Respecting Eastern Dealers—1954 1160

PAGE

Defendants' Exhibit 78 for Identification—Schedule Showing Tax Benefit to Webster (Leasehold Write-off and Nash Loss) 1161

Defendants' Exhibit 79 for Identification—Schedule Showing Tax Benefit to Webster (Nash Loss) 1162

Defendants' Exhibit 80 for Identification—Schedule Showing Tax Benefit to Webster (Leasehold Write-off) 1163

Defendants' Exhibit 81A—Washington Zone Warehouse Stock 1951-53 1164

Defendants' Exhibit 81B—New Packard Sales 1950 and 1951 (DeBaugh) 1165

Defendants' Exhibit 81C—Tabulation of Sales by Packard Dealers other than Zell and Webster to Baltimore Residents, June 1952 through 1953 1166

Defendants' Exhibit 81D—Average Annual Automotive Profits (Webster) 1174

Defendants' Exhibit 81E—Schedule of Zell Advertising 1175

Defendants' Exhibit 81F—Schedule of Zell and Webster Net Working Capital 1951 1176

Defendants' Exhibit 81G—Tabulation of Used Cars Taken in Trade 1950-53 (Zell) 1177

Defendants' Exhibit 81H—Tabulation of Used Cars Taken in Trade 1950 and 1951 (Webster) 1178

Defendants' Exhibit 81I—Schedule of Average Trading Losses and Variable Gross Profit (Webster) 1179

Defendants' Exhibit 81J—Schedule of Average Trading Losses and Variable Gross Profit (Zell) 1180

United States Court of Appeals

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[1021] Mr. Smith: So that it is understood that we can use them as records in the regular course of business without calling——

Mr. Leahy: Will you state them to be a fact that they are?

Mr. Smith: We state that they are.

* * *

CLARE E. BRIGGS was called as a witness by the defendants and, being first duly sworn, was examined and testified as follows:

* * *

Direct Examination by Mr. Denit:

[1022] Q. Will you state your full name, please, sir? A. You wish me to stand when I am speaking or just sit here?

The Court: Oh, no. You may keep your seat.

The Witness: My name is Clare E. Briggs.

The Court: What is your first name?

The Witness: Clare, C-l-a-r-e.

By Mr. Denit:

Q. Where do you live? A. I live at Grosse Point, Michigan.

Q. What is your business or profession? A. I am a sales executive for Chrysler Corporation.

Q. How long have you been in the automotive business? A. 32 years.

Q. What has been your experience briefly in the automobile business? A. Starting out as a clerk in 1923. I

entered sales in 1929, went up to the various positions to vice president of sales of Packard in 1953. Left Packard in 1955 to become top sales executive of Chrysler division of the Chrysler Corporation.

Q. Were you ever connected with the Graham-Paige Motor Corporation? A. I started with Graham-Paige in 1923.

Q. You remained there until 1939? [1023] A. Until 1939; correct.

Q. What is your present position? A. My present position is assistant to the president in charge of sales of the Chrysler division of the Chrysler Corporation.

Q. Will you describe for us briefly the system for distribution of its products which Packard had from 1946 through 1952? A. In 1946 on through '52, Packard distributed their products through two sales divisions, 19 selling zones, and approximately 1,600 dealers.

Q. Did Packard have written agreements with all dealers? A. They did, sir.

Q. And were those on a standard form? A. They were all on a standard form.

Q. And they were designated what? A. They were designated as selling agreements or dealer franchises.

[1024] *By Mr. Denit*:

Q. Was there more than one type of such an agreement? A. We had one type which went to all, but there were two different provisions, one is what we called the metropolitan area, and one is a single city dealer.

Q. What was the difference between the two? A. Simply that the metropolitan area contract provided equal

selling rights to one or more dealers in that particular area, while the single city dealer provided the selling rights to only one dealer in that area.

Q. How many single dealer contracts did you have in 1952? A. We had approximately 1,100.

Q. And how many metropolitan area contracts? A. We perhaps had as many as 300 contracts in approximately 75 cities.

Q. Were there any cities in which there was only one dealer in 1952? A. There were approximately 1,100.

Q. Out of a total of how many? A. Out of a total of 1,600.

Q. Was that true with reference to dealers in other automobiles, as far as you know? A. Yes, sir. Well, it is a matter of record that they would have more single dealers than 1,100, because [1025] they had a greater over-all count of dealers.

Q. So it is nothing unusual in the automobile industry for a city to have one single dealer, is it? A. No, sir. That is standard practice.

Q. In the course of your duties as general sales manager, did you receive reports from time to time concerning dealers throughout the country? A. Yes, sir.

* * *

[1026] The Court: I would like to inquire the purpose of these exhibits. [Exhibits 15, 16, 16-A, 17]

Mr. Denit: These exhibits are offered in evidence for the purpose of showing the information that was transmitted to Mr. Briggs by his subordinates during this period of time, and especially with reference to the Webster Motor Car Company and Zell Motor Car Company.

* * *

[1027] Q. Mr. Briggs, were the contents of Defendants' Exhibit 15 known to you (handing Exhibit 15 to the witness)? A. Yes, sir.

Q. And particularly the information that appears on page 4 of this exhibit, which I shall read to you:

* * *

[1028] What is meant by the expression "price class"? A. By "price class" is the measure by which we take the market penetration; and by "market penetration" we mean the number of automobiles, of Packards that were sold against competition in the price class in which we were operating.

Q. Did you in the factory estimate the price class [1029] penetration which you thought Baltimore was capable of, which you thought Packard could get in Baltimore? A. Our measure on price class penetration was first determined on a national average basis, and there were towns like Baltimore, in metropolitan areas, where we must expect better market penetration to offset some of the rural areas where Packard was not strong.

Q. What is meant by the expression "variable gross profit" in the automobile trade? A. "Variable gross profit" is determined by dividing the total number of new cars sold by the gross profit from the sale of both new and used cars.

Q. Is the figure $1,017 per car of any significance to you? A. I don't know what figure you refer to.

Q. In the report of June 13, 1951, it is stated:

> "He now has a used car problem and I am sure that their price class will drop considerably and with his high variable gross profit per car of $1,017, you can see that there will be very little progress made, if any."

A. Yes, sir; $1,017 gross profit per car was probably about double the national average at that time.

Q. Of what significance would that be in a report on [1030] a given dealer? A. It would mean that the dealer is what we call a "creamer," a dealer who is not reaching for volume but is taking the highest possible gross on every deal he makes.

Q. Is that of advantage to the public or of disadvantage? A. A disadvantage because they are paying more than they can buy the car from the competing dealer.

Mr. Leahy: Would you give that answer again? I didn't understand it.

* * *

The Witness: In other words, that customer is paying more for that automobile than the price at which he can buy it from the competing dealer.

By Mr. Denit:

Q. Is that of advantage to Packard? A. No, not directly because it restricts volume, and [1031] our business is volume.

Q. Did you read and consider the following language which appears on page 4 of the memorandum of September 24, 1951:

* * *

[1032] What does the expression "his trading has been very tight" mean in the automobile business? A. It simply means that the dealer in attempting to get the highest possible gross profit has restricted his volume and is therefore referred to as a tight trader.

Q. With what results, so far as sale of new cars to him by Packard? A. Resulting in fewer sales and restricted

volume, both from the factory to the dealer and from the dealer to the public.

Q. Is tight trading beneficial to the public? A. Definitely not. They pay more to a tight trader than they do to a normal trader.

Q. What have you to say as to whether or not a 35 per cent gross profit is the average or otherwise? A. Well, as a matter of fact, the 35 per cent gross profit is higher than the gross profit which a dealer can obtain on a new car, and he therefore must be making money not only on the new car but on the used car also.

Q. And of course that means that the public has to pay more, is that correct? A. That is correct, sir.

Q. Did there also come to your attention memorandum dated September 3, 1951 (handing memorandum to the witness)? A. Yes, sir.

Q. I notice in the upper righthand corner, immediately [1033] under the date, there is the expression "19 terrible towns." What does that mean? A. Well, "terrible towns" is a term we used in the selling department at that time, more or less of a promotional idea, simply indicating that that market is not giving Packard Motor Car Company the business it had a right to expect.

Q. What did the memorandum indicate with respect to the quota of Zell Motor Car Company at that time? A. It indicates they were not operating up to national average.

Q. What was their total? A. What was their total quota in cars?

Q. Yes. A. I can't answer that.

Q. The memorandum indicates 400. A. I wouldn't remember that.

Q. And what was the quota of Webster Motor Car Company, as indicated in this memorandum? A. 175.

Q. And neither dealer was getting his price quota at that time; is that correct? A. That is correct.

[1034] Q. Was there also brought to your attention a letter from B. F. Marnocha to Ross H. Schroeder, manager business department, dated January 2, 1952? A. Yes, sir.

Q. In this letter there is listed as item 12, "Baltimore—Webster: Working capital; used car problem; used car lot; additional manpower; looser trading." What does that indicate to you as an automobile man?

* * *

The Witness: That report indicated to us that Webster Motor Car Company at that time was not a satisfactory dealer.

By Mr. Denit:

Q. Now, Mr. Briggs, it is in evidence here that in the month of January, 1952, you went to New York for a conference. Will you tell us, please, sir, the circumstances under which you went there, the purpose for which you went there? A. We were in New York in January, 1952, to attend as factory representatives—a national dealers' association meeting, and inasmuch as we were going to be in New York on that day, the appointments were set up for, I think, probably a dozen dealers in the United States that wished to have conferences with Mr. Abernethy and myself concerning [1035] their various problems. It is not unusual. It happens each time we attend one of these conferences, and that was the purpose of our being there at that time.

Q. Did you go to New York for the sole and only purpose of seeing Mr. Zell? A. No, sir.

Q. Was the arrangement to meet with Mr. Zell one of the usual incidents of attending a national automobile dealers' association meeting? A. Yes, sir, as I just stated.

we always have the requests for as many individual conferences as time will permit at one of those meetings.

Q. Tell us, please, sir, who attended the meeting, or who was with you when the meeting took place? A. As I recall, Mr. Abernethy, Mr. Beck, Mr. Spencer, part time, and Mr. Platfoot. That's all that I recall at the moment

Q. Was Mrs. Briggs also present? A. Oh, incidentally, Mrs. Briggs was with me on the trip, but of course did not attend any of these sessions.

Q. How long did Mr. Spencer remain at the meeting? A. Mr. Spencer was there only momentarily. He was in and out because he was holding some conferences of his own.

Q. Are you correct in your recollection that it was [1036] Mr. Platfoot who was at the meeting? A. It could have been either Mr. Platfoot or Mr. Fenn. I am not sure which. They were changing jobs at that time.

Q. What job did Mr. Fenn have? A. Either he or Mr. Platfoot had recently been appointed—I believe it was Mr. Fenn—to the job of Eastern Divisional Sales Manager.

Q. What was Mr. Platfoot's job? A. Fenn was replacing Platfoot on that job.

Q. Had Fenn been the Western Division Sales Manager? A. Fenn had been the Western Division manager.

Q. And he and Mr. Platfoot were exchanging locations, is that correct? A. That's correct, sir.

Q. What is your recollection of the discussion at the conference? A. Which conference do you refer?

Q. That you had with Mr. Zell? A. Mr. Zell had requested through the factory that we give him a little time in New York, which we agreed to do, and at that time he gave us the information that he had been steadily losing money in Baltimore, and that he could not continue losing

money, and told us at that time unless he could be made the exclusive dealer in Baltimore, he would be unable to continue with us.

[1037] Q. Did Mr. Beck have anything to say at that conference? A. Very little.

Q. What did you say to Mr. Zell? A. We simply told Mr. Zell that we would take his recommendations, and what he said, under consideration back in Detroit, and after due consideration of all the facts would make our own decision.

Q. Was any promise of any kind made to Mr. Zell at that time? A. No, sir.

Q. Did you know what Mr. Zell's general condition was at the time that conference took place? A. Yes, we were quite familiar with the circumstances and the reason being that he was one of the largest dealers we had in the United States. He had a fine place of business. He had been with Packard a great many years. Unquestionable reputation of integrity in the area in which he operated. He was a matter of concern that we might be in jeopardy of losing an account that had as much value as they did to us. So we were quite familiar with the background of the fact that he lost money, and the circumstances under which he was operating in Baltimore.

The Court: Why would one dealer lose money who apparently was selling a great many cars, and others in the same area make money? Is there some difference in the [1038] efficiency between them?

The Witness: Could be, Your Honor.

The Court: Wouldn't that indicate that perhaps Zell was not as efficient as some of the others?

The Witness: Not necessarily.

The Court: He was running too big an overhead for his business?

The Witness: That could be it, yes, sir.

By Mr. Denit:

Q. Do you know anything about the trade-in allowances that Zell made? A. Well, we were quite familiar with the fact that Zell was at that time reaching for volume. His trading, as I remember it, his over-allowances, were equal to or possibly greater than the national average. They were certainly greater than other local competition with Packard. He was making a sincere attempt to get volume to sustain the high overhead he had, and therefore was trading.

Q. Was that indicated by dealer reports to the factory from time to time? A. Yes, sir; his monthly reports.

[1039] Q. Was that also indicated by the reports which the field men made from time to time? A. Yes, sir.

Q. Did Packard ever give a dealer exclusive selling rights in the city? A. You say "in the city"?

Q. Yes. A. Yes, sir.

Q. What does that involve? A. That simply means that when we appoint a dealer and give him exclusive selling rights, that we will not appoint other dealers in that same area.

Q. Would the exclusive right be conferred by any division of the regular form dealer contract? A. It was on a regular form contract, sir. There was an addendum in which we describe the territory in which he would operate.

* * *

Q. Was Zell ever given exclusive selling rights in this way? A. No, sir.

[1040] Q. Was it contemplated that Zell should have such rights? A. No, sir.

Q. How was he to be made sole dealer? A. Simply by our refusal to appoint other dealers in that area.

Q. Now, there came a time, did there not, when a decision was reached upon Mr. Zell's request? A. That is right, sir.

Q. When was that? A. I don't recall the exact date. I believe it was in February of 1952.

Q. Who made the decision? A. I did.

Q. Prior to making the decision, what factors did you take into consideration, and with whom did you confer? A. We conferred with Mr. Abernethy who at that time was assistant general sales manager, Mr. Armstrong, who was my administrative assistant, Mr. Beck who was the zone manager, and the people at the central office who were in charge of our business management department, and other executives at the central office in the sales department.

Q. Did you examine any files or data that had been assembled at the factory with respect to Mr. Zell? A. Oh, yes, sir. We examined every—all the factual [1041] information we had, opinions which had been written in from the field, and reports. In fact, everything.

Q. Did you also consider in reaching a decision anything with respect to Webster Motor Car Company? A. Yes, sir. We were faced with the decision at that time in Baltimore of putting in one dealer because of the restricted volume, and the question as to which one it should be; and after due consideration we decided it should be Mr. Zell.

Q. Will you tell us the reason upon which you acted in reaching that conclusion? A. Well, our business is selling automobiles, and we had here represented what to

us were two customers. They buy cars from us, and they pay for them, and they in turn sell them. Here on the one hand we had a dealer who had very fine facilities. A man who had been in Baltimore a great many years. A man who had very adequate service facilities. A man who had plenty of working capital. A man who had a good organization. A man, in fact, who had demonstrated to us that he was one of the best dealers, volume-wise, in the United States.

Q. What else did you consider, if anything? A. We also had to consider the situation with respect to Webster Motor wherein the things that we needed as a single [1042] dealer city like Baltimore did not exist in the Webster Motor Company. They did not have adequate service facilities to take care of one of our principal obligations, and that is an obligation to the customers, the people who buy Packards and own and run them in Baltimore. They did not have adequate capital. They did not have adequate housing facilities to handle the volume that we must expect out of Baltimore. We therefore made our decision to continue on with Zell as the sole dealer in Baltimore.

Q. If Zell had quit, as he indicated, what would have been the situation in Baltimore so far as Packard and Packard owners were concerned?

Mr. Leahy: I object to that, if Your Honor please. I think that is speculative.

The Court: Objection sustained.

By Mr. Denit:

Q. When you considered reaching a conclusion upon Mr. Zell's request, did you consider the effect of Zell's quitting upon Packard and Packard owners in Baltimore? A. Very definitely.

Q. What did you determine with respect to that? A. Well, there were two things involved. No. 1, we needed volume representation in Baltimore. No. 2, Mr. Zell had a national reputation among dealers. Packard at that [1043] time needed dealers. We needed dealers very badly. Our volume naturally wasn't too high. We could ill afford to lose the type of dealer we had in Mr. Zell of Baltimore at that time.

Q. Was Zell aggressive? A. I would say Mr. Zell was very aggressive.

Q. Was he what is called a volume dealer in the trade? A. He was a volume dealer to the extent that if my memory serves me correctly, he was among the top ten dealers in the United States.

Q. How about Webster? Was Webster's organization aggressive? A. Well, they perhaps were in a way. They had a high gross profit per unit. But strictly from a sales standpoint, which is after all our job in selling automobiles, they were not aggressive in reaching for the volume, which we had a right to expect in Baltimore.

Q. From the standpoint of Packard, was it your judgment that continuing Zell would be more beneficial to Packard than if Zell were to quit and Webster would continue as sole dealer? A. Definitely.

Q. Why? A. One was able to do the two things that we as a factory, and particularly as a sales division in any area [1044] wanted. The No. 1 responsibility in sales is to maintain service for Packard owners who have already bought our product and are running them in that area. Webster Motor Car Company did not have adequate facilities by any stretch of the imagination to handle the amount of service business that was available in Baltimore, and to take care of our customers. Mr. Zell, on the other hand,

did have those facilities. Our next responsibility is to get a certain amount of Packard business out of every area. And by the records of the two, it was clearly indicated that Webster would not or could not reach the volume which we had a right to expect out of Baltimore. Mr. Zell had by his previous actions been a volume dealer, and we assumed that if we made this change, that we would even increase our market penetration in Baltimore over what we had done with two dealers. As a matter of record, that is exactly what happened.

Q. What do you mean by that? A. Well, we did increase our volume of business in Baltimore after we went to a one-dealer operation.

Q. What consideration, if any, did you give to the fact that Webster's figures indicated that organization was operating in the black, and Zell's figures indicated his [1045] operation was in the red? A. Well, we must of necessity give consideration to the operating profits of all dealers. However, we in sales are charged with responsibility of selling.

Mr. Leahy: I object. He is not answering the question.

The Court: Objection sustained.

Mr. Denit: Will you repeat the question?

The Court: Read the question.

The Reporter (Reading): "Q. Now, what consideration, if any, did you give to the fact that Webster's figures indicated that organization was operating in the black, and Zell's figures indicated his operation was in the red?"

The Witness: We did give consideration to those factors, and as a matter of fact, it was one of the reasons why we decided to go to a sole dealer

in Baltimore, because with the volume which Mr. Zell was enjoying at the time was not sufficient for him to operate in the black with the overhead which he had, which was our principal factor of going into a single city dealer.

[1046] Q. From the examination of Zell's reports and the information given to you by the field representative, were you of the opinion that Zell's operation, overhead expenses, were too high? A. They were too high for the amount of volume he was doing.

Q. Was some recommendation made to him to decrease those overhead expenses? A. Yes, we made recommendations where we thought some savings could be made. However, Mr. Zell was a volume operator, and wished to make every attempt to get the amount of business out of Baltimore which we had a right to expect.

Q. How did the plant of the Zell Motor Car Company compare with the plant of Webster Motor Car Company? A. Well, they were two different type operations. Zell Motor Car Company was strictly a downtown metropolitan dealer, with one of the finest facilities in Baltimore, according to our opinion. It was up to our standards in every respect. The Webster Motor Car Company was not what you would term a large downtown dealer. They were more of a suburban type dealer, with smaller facilities.

Q. Would you indicate by comparison whether Webster was a third as large or a half as large as the Zell Motor Car Company facilities? [1047] A. Well, I am not sure about all the dimensions, but I believe you could probably take in the whole Webster building and put it in a part of Mr. Zell's service station.

Q. At the time you made your decision, was Packard having any difficulty in competing with other manufacturers for suitable dealers?

* * *

The Witness: We were—and of course that's axiomatic in this business. There is always competition between manufacturers for dealer selling outlets. Packard at that time was having an extremely rough going for the reason that as a matter of record the independent manufacturers were [1048] faring very badly against the Big Three. We had extreme competition for anybody who had the capital to go into business to represent an automobile manufacturer. It was very difficult to do.

By Mr. Denit:

Q. I asked you a moment ago, and I am not quite clear whether you answered the question fully, in studying the request of Mr. Zell and in reaching a conclusion upon it, did you examine the records of the Webster Motor Car Company, that is, the reports that had been made to the factory, and the financial statements of Webster? A. Yes, sir.

Q. In reaching your conclusion to make Zell sole dealer in Baltimore, did you consider whether or not this would enable Zell to charge higher prices to the public than he could if he were not sole dealer? A. No, sir, that never came into our thinking for the reason that we have, as I stated before, over 1,100 in the United States, some of them nearly as large as Baltimore, where we have a single dealer operation.

Mr. Leahy: I object. He answered the question.

The Court: Objection sustained. You have answered the question. Please confine yourself to answering questions.

By Mr. Denit:

[1049] Q. Would it have been possible for Zell to charge higher prices in Baltimore simply because he was sole dealer?

Mr. Leahy: I object. Speculative.
The Court: Objection sustained.

By Mr. Denit:

Q. What effect upon a dealer's business does the fact that he charges higher prices than are warranted have?

* * *

The Witness: Simply restricts volume.

By Mr. Denit:

Q. How did that affect his ability to compete with other makes? A. It was very definitely adversely affected.

Q. By the way, Mr. Briggs, what cars were considered in Packard's price class in 1952? A. Cadillac, Lincoln, Buick, Oldsmobile, and Chrysler.

Q. They were the cars your dealers were competing with on the market, is that correct? [1050] A. Correct, sir.

Q. Did you personally communicate your decision to comply with Mr. Zell's request to Mr. Zell? A. No, sir.

Q. Or to anybody? A. I personally communicated that to Mr. Abernethy.

Q. What did you tell him to do? A. We simply told him we were going to make Mr. Zell a single dealer or

the sole dealer in Baltimore, and not to renew the Webster contract.

Q. Between the time of the January visit in New York, and the date when you reached that conclusion, did you talk with Mr. Zell? A. No, sir.

Q. Or anybody connected with the Zell organization? A. No, sir.

Q. Thereafter, was there brought to your attention letters between Mr. Beck and Mr. Webster with respect to the failure to renew Webster's contract? A. I remember some correspondence in that direction, yes.

Q. Was there brought to your attention a letter from Mr. Beck dated February 25, 1952, with respect to an exchange of letters he had with Mr. Richard Webster? A. I am sure the file was reviewed.

[1051] Q. What did you do with respect to that correspondence? A. I turned that over to Mr. Abernethy and Mr. Armstrong. I am not quite clear, Mr. Denit, on which correspondence you refer to.

Q. Letter of February 14, 1952, written by Mr. Beck to Mr. Webster. Letter of February 20, written by Mr. Webster to Mr. Beck. Letter of February 25, written by Mr. Beck to Mr. Abernethy with respect to the Webster situation. A. Yes, sir, we reviewed that file.

* * *

[1052] Q. I ask you what you directed Mr. Abernethy or Mr. Armstrong to do with respect to that correspondence? A. Well, this was the case where it was indicated that——

Mr. Leahy: I object.

The Court: Objection sustained. Please confine yourself to answering questions.

The Witness: I will try to, sir. I turned that correspondence over to Mr. Abernethy and Mr. Armstrong for action.

By Mr. Denit:

Q. What did you direct them to do? A. I directed them to talk to our legal counsel on this [1053] matter, and it looked like it was a case that had become possibly legal rather than commercial, and turned it over to them for such action as should be taken.

Q. Why did you think it looked like a case that had become legal rather than commercial? A. Well, as I remember it, we had fully intended to make Zell, Mr. Zell, the sole dealer in Baltimore, and that an action on the part of our zone manager down there had indicated that we might have committed ourselves to another contract with Webster Motor Car Company, and for that reason Mr. Abernethy and Mr. Armstrong were instructed to go to Washington and fulfill that agreement if we had one.

* * *

[1054] Q. Was there brought to your attention, Mr. Briggs, the memorandum to Mr. F. L. Armstrong, identified as Defendants' Exhibit 18? A. Yes, sir.

Q. And also the memorandum to Mr. Abernethy, identified as Defendants' Exhibit 19? A. Yes, sir.

Q. Now, I understood you to say that Mr. Armstrong was your administrative assistant. A. That is right.

Q. Mr. Abernethy was your assistant general sales manager? [1055] A. Right.

Q. How were the offices that you gentlemen occupied located? A. I had the corner office; two secretaries' offices in between; Mr. Armstrong's office next; the secretary's office, and Mr. Abernethy's office.

Q. Was it the practice of you gentlemen to confer almost daily respecting business affairs of the company? A. Daily, and several times during the day.

Q. With regard to this Webster matter, did you gentlemen confer frequently or otherwise concerning it? A. Very frequently.

Q. Why? A. Because it was a matter of great importance to us. Baltimore is a large city. Zell Motor Car Company was a very important account to us.

Q. Did the effect of Mr. Beck's apparent commitment cause any discussion among you gentlemen? A. It caused a great deal of discussion.

Q. Why? A. Well, we felt the action on the part of Mr. Beck, in giving Mr. Webster the letter he did, implied that we were committed to a contract, and that was the reason Mr. Abernethy and Mr. Armstrong were requested to go to Washington and offer the Webster Motor Car Company another contract.

[1056] Q. You said "Washington." Did you mean that? A. I meant Baltimore.

Q. Did you know what was referred to in this memorandum:

> "Donald stated that it was his opinion that because of his father's investment in Baltimore, it was his intention to recover damages under the 'Case' law, should their Packard franchise be terminated"?

A. No, sir.

Q. Did that mean anything to you, as an automobile manufacturer? A. No, sir.

Q. Or distributor? A. No, sir.

Q. After giving Mr. Abernethy and Mr. Armstrong the instructions that you said you gave them, did you have

any further contact with this Webster motor car situation? A. From there on out we in the commercial end of the business, and in my position particularly, I had very little contact. It was then in the hands of our Mr. Armstrong, who was our legal liaison man.

The Court: You are going beyond the confines of the question.

By Mr. Denit:

Q. Did you authorize Mr. Abernethy and Mr. Armstrong [1057] to offer Mr. Webster a contract of renewal for one year? A. Yes, sir.

Q. Was that without any strings tied to it or any conditions imposed? A. No strings or conditions whatever.

Q. And if that contract were extended to 1953, do you know whether they were authorized to renew it again if conditions warranted? A. They were not authorized.

* * *

Q. Had you any understanding with Mr. Zell which would make it impossible for Packard to renew Webster again in '53? A. No, sir.

Q. Now, subsequently to February of 1952, did you come to Washington for a showing of your dealers? A. As I recall, we were in Washington either in April or May for a special dealers' showing, yes, sir.

Q. And who were invited to that showing? A. As I remember it, it was what we called a "VIP" meeting, or a very important people's meeting, in which people and our dealers were invited in to a special showing of our cars.

[1058] Q. Were all of the dealers invited? A. Yes, sir.

Q. Do you know whether Webster was invited? A. I wouldn't know for sure.

Q. Did any representative of Webster appear at that meeting? A. I don't recall.

Q. Did any representative of Zell Motor Car Company appear at the meeting? A. Yes, sir. Mr. Zell was there.

Q. Did you have any discussion with him regarding the Baltimore situation? A. Yes, sir.

Q. What was it? A. Simply a reiteration on his part that he was having difficulty in making money down there, and it was the same story we had heard before, and we listened and made no comments or suggestions, or decisions.

Q. What was the chief problem which Packard had in trying to sell as many automobiles as it could, Mr. Briggs?

* * *

A. Our chief problem is strictly a matter of competition.

* * *

[1059] Q. How does competition with other makes manifest itself? A. I beg pardon?

Q. How would competition with other makes manifest itself? A. Simply by very strong sales promotion, advertising, the prices at which they sell their goods, and the size of the package.

Q. What was the principal inducement offered by dealers of other makes? A. I would say the price at which they can buy.

Q. What, if anything, did Packard seek to do about this? A. We encouraged our dealers to go as far as they could to meet competition in trading, thereby increasing their volume.

Q. Do you know whether there were many Packard owners in '52 who insisted upon buying a Packard car.

notwithstanding a greater price inducement offered by other makes? A. There are always a very few.

Q. Any considerable number? A. No, sir.

Q. Did Packard have some test by which it measured its success in meeting competition of other makes? A. Yes, sir. That is supplied by a national company [1060] known as R. L. Polk, who gives market penetration figures for every make and every locality in the United States.

Q. And is that shown in volume or by percentage? A. Both.

Q. Was your decision to make Zell sole dealer influenced by any desire and purpose on your part to sell more Packard automobiles in Baltimore? A. Yes, sir.

Q. In the Baltimore area? A. Yes, sir.

* * *

Cross-Examination by Mr. Leahy:

Q. Mr. Briggs, when did you first become connected with Packard? A. In August, 1939.

Q. In what capacity did you go there? A. As a regional manager.

Q. For what region? A. Dallas, Texas.

Q. When did you become acquainted with the division in which Baltimore is located? A. In 1944.

Q. Did you then move to the head office in Detroit? A. Yes, sir.

[1061] Q. So from '44 on you were in the head office in Detroit? A. That is right, sir.

Q. And in '44 you weren't making any automobiles for sale to the public, were you? A. No, sir.

Q. And you didn't make any, did you, from around '41 on to '46? A. That is approximately correct.

Q. And in '46 you didn't make very many automobiles for sale, did you? A. No, sir.

Q. You were slow in getting started, weren't you? A. Right.

Q. And you stayed slow in getting started until about '49, didn't you? A. Well, I don't know what measure you use in saying "slow."

Q. Don't you understand what "slow" means? A. Yes, sir.

Q. Weren't you slow? A. For what period?

Q. For the period I mentioned, '46, '47, '48, up to the middle of '49? A. No, sir. That is not true.

[1062] Q. When did you get in full production? A. 1949.

Q. What part of '49? A. Early '49.

Q. Then you were slow in '46, '47, '48, and up to the early part of '49? A. Up to '49.

Q. And what part of '49 did you go in full production? A. I don't recall.

Q. Well, you were in charge, weren't you, of that business then? A. I was not in charge of manufacturing.

Q. Weren't you in charge of sales? A. Yes, sir.

Q. Didn't you know what affected sales? A. Yes, sir.

Q. Wasn't the fact whether it was slow in production or full in production a matter which very seriously affected sales? A. Well, I might add, if I may——

Q. Yes, go ahead. A. '49 was the biggest domestic year Packard ever had.

Mr. Leahy: Now, will you please read him the question?

The Court: You may read the question.

[1063] The Reporter (Reading):—

"Wasn't the fact whether it was slow in production or full in production a matter which very seriously affected sales?"

A. Well, do you want to qualify it for the period again?

By Mr. Leahy:

Q. Now, then, will you answer the question, please, and then we will take your comment later? A. The question doesn't give me what time, Mr. Leahy.

Q. Doesn't the question of whether your company is slow in production or full in production affect sales at any time? A. Yes, sir.

Q. Now, then, will you answer the question? A. We were slow in production and sales both in '46, '47, '48.

Q. And part of '49? A. We couldn't have been slow very much of the time because we had the biggest year we ever had.

Q. Now, can you tell us when in '49 you became in full production? A. No, sir.

Q. When then did you really become acquainted with the sales in the Baltimore metropolitan area, as an official [1064] of Packard? A. It came to our attention that Mr. Zell was in trouble profit-wise, as I recall it, in 1948.

Q. Was he in trouble in '49? A. Yes, sir.

Q. Was he trouble in '50? A. Yes, sir.

Q. Was he in trouble in '51? A. Yes, sir.

Q. Was he in trouble in '52? A. Yes, sir.

Q. Was he in trouble in '53? A. As I recall it, he was.

Q. Never got out of it, did he? A. No, sir.

* * *

[1066] Q. I think we were inquiring about the method of distribution of Packard cars in Baltimore prior to 1946. Are you familiar with that? A. Yes, sir, I believe that was the year they gave up the distributorship.

Q. And they went into multiple dealers, didn't they? A. Yes, sir.

Q. So far as Packard was concerned, Packard had [1067] insisted upon having multiple dealers in Baltimore even under the distributor system; isn't that right? A. That is correct.

* * *

[1069] Q. Do you know what it was that moved Detroit to change the system from a distributor system, that is in Mr. Zell, to the multiple dealer direct system? A. You are talking about the general policy?

Q. Yes—in Baltimore. A. Baltimore was a part of the national policy, and the national policy was to meet competition.

Q. To meet competition, because of what reason? A. In the method of distribution.

Q. You thought then that the multiple dealer system was more efficient to meet competition from the factory viewpoint than the distributor system? A. No, sir; that was not the reason.

Q. Well, give us the reason. A. The reason is that the distributors as a whole were not doing the wholesale job which we thought we could do as a factory, and do better.

Q. What do you mean by the "wholesale job"? A. That is the district managers, service representatives, and parts travelers in the field.

Q. Well, they weren't selling cars. Isn't that what [1070] you mean? When you sell wholesale you mean sell your cars? A. That is right.

Q. And you figured the distributor wasn't doing a job of selling Packard cars to their subdealers or dealers underneath? A. That is right.

Q. And you thought Packard ought to take it over and give it directly to the dealer and let them compete with themselves, is that right? A. Give what to the dealer?

Q. The wholesale sale of Packard cars—what we have been talking about. A. Well, that is true. They paid the same price they paid before.

Q. Paid who the same price? A. The dealer.

Q. The dealer paid the same price, but he paid the price to the distributor before? A. That is right.

Q. You know what I am referring to, don't you? A. No, I don't believe I do.

Q. You said that the reason why you changed from the distributor system to the multiple dealer system was to better meet competition. A. I don't like the term "changed from the distributor [1071] system to the multiple dealer system". We changed from a system of distributors to direct dealers.

Q. You object to the word "system"? A. No. I object to the words "multiple dealer system." That is not what we did.

Q. There is a difference between the dealer under the distributor system and the dealer direct with the factory, isn't there? A. Yes.

Q. Then there is a difference between the two dealers in that essential, isn't there? A. Yes, but our change was from distributors to a direct dealer system; not from distributors to a multiple dealer system.

Q. All right. Direct dealers, then. A. That's right.

Q. And in the Baltimore region, or zone, the Washington zone and in Baltimore metropolitan area, there was a multiple direct dealer system set up? A. That is right, sir.

Q. And you did that to better meet competition; is that right? A. That is right.

Q. And in meeting competition you were meeting, so [1072] far as you were concerned, particularly the competition in Lincoln, Cadillac, Buick, Oldsmobile, and what was the other? A. Chrysler.

Q. Isn't that right? A. Right.

Q. That is what you call price class, isn't it? A. That is right.

Q. So that you changed over in the Baltimore district to a multiple direct dealer system to better your price class competition; isn't that right? A. That is right.

Q. What? A. That is right.

* * *

[1073] Q. How many times had you been in the Webster Motor Car Company's place of business? A. Once.

Q. When was that? A. I am not sure. I think it was in 1948.

Q. That was before the fire, wasn't it? A. I believe it was.

Q. Did you ever see it after the building had been remodeled? A. No, sir.

Q. You said you could put the building in one of the other buildings of Mr. Zell's place of business? A. That is right.

Q. How do you know that if you never saw it? A. We have dimensions and pictures and photographs of it in Detroit, like we have of all dealers.

Q. Can you tell the size of a building from the photographs? A. No; we had dimensions.

Q. Where did you get the dimensions? A. They are part of our service operations.

Q. The only time then, as I understand, that you ever visited the Webster place of business was in 1948? [1074] A. I am not sure about the year, but I was only there once.

Q. And was it on official business? A. Official business, yes, sir.

Q. Do you know who was there in the personnel, or in the group, as officials, and so forth? A. You mean from the factory?

Q. Yes. A. I believe Mr. Braden and myself; I am not sure.

Q. I show you three pictures that have been identified as Exhibits 13, 13-A and 13-B. Are those the pictures of the motor company, Webster Motor Company, that are on file in Detroit? A. I assume they are, but I couldn't be sure.

Q. Did you ever see those pictures before? A. I can't remember.

Q. Do you know whether those pictures are in Detroit? A. No, sir.

Q. Then you don't know what the dimensions are, do you? A. Yes. We have the dimensions in Detroit.

Q. Is it your testimony that you looked up the dimensions of the rooms and of the building of this man here, Webster Motor Car Company? A. No, sir. I say they are on exhibit and a matter [1075] of record in Detroit.

Q. Can you tell us what the dimensions are? A. No, sir.

Q. Can you tell us the dimensions of Zell? A. No, sir.

Q. Yet you say you can put one in the other; is that right? A. That is right.

Q. When is the last time you saw the Zell Motor Car Company buildings? A. The same visit I made at the time I called on Mr. French.

Q. That was back in '48? A. Yes, sir.

Q. And you haven't been in Baltimore since? A. No, sir.

Q. To see any of those buildings? A. No, sir.

Q. Did you ever talk with Mr. French since on the telephone? A. No, sir.

Q. Did you examine personally the reports which you got each month from Webster? A. Most of them.

Q. Did you notice the composite reports that came in [1076] from the zone office? A. Yes, sir.

Q. Did you ever compare the relative efficiency of the dealers within the zone, each with the other, to determine how they were doing business? A. That was done, yes.

Q. How did you find that the Webster Motor Car Company compared with Zell on the composite report? A. We found that their gross profits per car were high, in fact they were double our national average, and their volume was low.

* * *

[1077] Q. How did Zell do? A. Well, as has already been offered, his profits were not good. In fact he didn't have any.

Q. He didn't have any, did he? A. No.

Q. Didn't have any at any time since Packard started to make automobiles again for sale to the public; isn't that right? A. That is substantially correct.

Q. Now, I think you were shown some exhibits here with regard to Webster. Is it your contention that Webster was not a good dealer? A. No, sir.

Q. Is it your contention that prior to the conversation in New York, the conference of January 29th, that you had determined to eliminate Webster? A. You say had we made the decision to eliminate Webster?

Q. Yes. A. We had made no such decision.

Q. Had anybody at any time in the Packard Motor Company prior to the conference in New York of January 29th, concluded that Baltimore should be made a one dealer city? A. No, sir.

Q. Let's go back and take a look at some of these [1078] things we looked at together earlier. You were shown here Defendants' Exhibit 16, dated January 2,

1952. This is a photostatic copy of a letter from Ben F. Marnocha, zone business manager; it is dated January 2, 1952, and it is on the letterhead of Packard Motor Car Company, Washington Zone Office, and it is sent to Mr. Ross H. Schroeder, Manager, Business Management Department, Packard Motor Car Company, 1580 East Grand Boulevard, Detroit, Michigan. You know Mr. Schroeder, of course? A. Yes.

Q. Where was his office with relation to yours? A. About five offices down the hall.

Q. You had occasion, did you, to consult with him daily with reference to conditions of business? A. Almost daily.

Q. And did you have the occasion to talk about Baltimore particularly? A. Yes, sir.

Q. And this was a letter, I take it, which was prepared by Mr. Marnocha in the regular course of his duties and business for Packard? A. That is right.

Q. And to be remitted to the head office in Detroit: am I right? [1079] A. Right.

Q. And Mr. Schroeder would take the matter up with you, is that right, when these reports came in? A. He would take the matter up with Mr. Abernethy, and some of them with me.

Q. But you think, you told us, he took that up with you? A. That is correct.

Q. And who was Mr. Marnocha at that time? A. He was zone business manager in Washington.

Q. How long had he been business manager in Washington at that time? Do you know? A. I can't answer that.

Q. Do you know how long he remained as business manager in Washington? A. No, sir.

Q. But at all events, that memorandum, or letter, whatever we choose to call it, was written in the ordinary course

of business by Mr. Marnocha, your zone business manager, to your top business manager in Detroit? A. That is right.

Q. And it was about loss dealers, wasn't it? A. It was about problem dealers.

Q. Problem dealers. Whose name heads the list? A. Baltimore—Zell.

[1080] Q. How far down on the list do they discuss Mr. Webster? A. They are not according to rank and size.

Q. Whether they are according to rank or not, I am asking you how far down on the list is he? A. Twelfth.

Q. Let's take a look at that for a moment. This is headed up "Problem dealers." What did that mean to you in Packard, as a manufacturer of automobiles? A. That meant that we might have a problem with that dealer in not obtaining a sufficient volume for us. It might have meant he was losing money. It might mean that his facilities were not adequate. In other words, in some standard or another he was not up to Packard standards.

Q. One of your standards, I think you told the jury just a short while ago, was to get volume, wasn't it? A. That is correct.

Q. Because volume meant that the factory sold more cars? A. That is correct.

Q. Isn't that right? A. That is right.

Q. And I think you said that one of the reasons which compelled you to the decision to make Zell the sole dealer in Baltimore was that he was constantly aggressive toward [1081] volume, wasn't he? A. That is correct.

Q. What? A. Yes, sir.

Q. And he had been, had he not, down through the years as a dealer? A. He had done a good job, volume-wise.

Q. And it was a consistently good job, wasn't it? A. That is right.

Q. And Mr. Marnocha was telling you that Mr. Zell headed the list of problem dealers as a loss dealer. For what reason? A. For the reason he was losing money.

Q. Please, please. A. That's what it says here, "Loss dealer; low new car volume."

* * *

[1082] Q. Low new car volume, isn't that right? A. Yes.

Q. Now, let's take Mr. Webster on that list. Am I reading this correctly there to the jury?

> "Working capital; used car problem; used car lot; additional manpower; looser trading."

Have I read those correctly? A. Yes.

Q. "Used car problem." What does that mean to you when you read this as a Packard official and as an automobile dealer or salesman or manufacturer? A. That he did not have adequate facilities to handle a sufficient volume of used cars in order to do more new car business.

Q. So that the problem insofar as Mr. Marnocha put it to the factory in Detroit was one where Mr. Webster's policy with reference to used cars reflected adversely to the factory because he didn't get enough used cars, is that it? A. That's one of them.

Q. One of them. And the other problem was you thought he ought to have another used car lot? A. That's part of the same problem.

Q. Was that because he didn't have space to show his used cars? [1083] A. I assume that was it. I think that was it.

Q. Did you take this up in any way with Mr. Webster? A. Our zone office.

Q. Do you know that to be true? A. I believe it is a matter of record.

Q. Do you know it? A. Yes, I do know it.

Q. What was the result? A. The result, we got no action on it.

Q. You got no action on what? A. On increasing used car facilities to bring them up to our standards.

* * *

[1084] Q. Can't you tell us whether or not you can refer us to any papers that show that the used car facilities of the Webster Motor Car Company were not up to your standard? A. I believe that was offered in one of the exhibits here this morning.

[1085] Q. All right. Then we will catch it as we go along. What was the standard? A. On used cars?

Q. Yes. A. It varied with every dealer.

Q. I beg your pardon? A. It would vary with the size of every dealer.

Q. What did it mean insofar as Mr. Webster was concerned? A. It meant an adequate place to sell, display, used cars, sufficient room or lot for display. And beyond that I wouldn't know.

Q. Did you know how many used cars he had at the time? A. I can't recall now.

Q. Did you know whether he had a lot or not? A. No, sir.

Q. Did you know what you were asking for here, or Marnocha was suggesting, an additional lot or a lot? A. I don't recall.

Q. Did you know how much space he had in the new building for the display of used cars? A. I don't remember that.

Q. Do you know what used cars they were? A. You mean, how many he had?

Q. What type? [1086] A. No, sir.

Q. What make? A. No, sir.

Q. Did you know that most of them were your old model you couldn't move in 1951? A. No, I didn't know that.

Q. You did know you were having trouble, didn't you? A. That's right.

Q. You had a lemon, didn't you? A. I couldn't call it that.

Q. Well, it didn't move, did it? A. What year?

Q. In 1950, '51. A. Are you talking about new cars or used cars?

Q. I mean your model that you had at that time which was on the market trading in? A. The old '49 was hard to move, yes.

Q. Yes. Hard to move all through '50, wasn't it? A. That is right.

Q. Yes. And '51, too, wasn't it? A. Yes.

* * *

[1088] Q. You didn't have any difficulty in telling us about the used car problem. Can't you tell us how the used car problem reflected itself in the profit of Mr. Webster? A. No, I wouldn't recall those figures.

Q. Didn't you take that into consideration when you were considering whether a dealer that never made a dollar profit should be made a one-man dealer over against Mr. Webster? A. Profits were a matter of consideration, yes.

* * *

[1089] Q. "Looser trading," what does that mean to you as an automobile man as one of your criticisms? A. That means we ought to have more volume, bigger offers to Packard owners or prospective Packard owners who want to buy automobiles by making greater allowances.

* * *

[1090] Q. Isn't it a fact that by "looser trading," you mean that you wanted your dealers to give greater allowances on trade-ins? A. That's correct.

Q. Yes. In order to give you a chance, a better chance, of selling automobiles from the factory? A. That's right.

Q. So this report is gotten up, isn't it, from the standpoint of a factory man? A. Right.

Q. As to how he can get more Packard cars through the dealers out to the public? A. That's right.

Q. And you didn't care so much whether by giving greater allowances the dealer lost money, did you? [1091] A. Yes, we did. Greater allowances in effect may not mean greater losses for the dealer.

Q. It did with Zell, didn't it? A. Not necessarily so.

Q. Let's put it this way: Zell, you said, gave greater allowances, didn't you? A. That's correct.

Q. What happened to him? A. He lost money.

Q. Now, let's take—what number is January 3, 1951?

The Deputy Clerk: That's Defendants' Exhibit No. 15.

Mr. Leahy: Exhibit 15.

By Mr. Leahy:

* * *

[1092] Q. Now, you were shown on that report, which is dated June 13, 1951, and made to you by whom? A. E. J. Platfoot.

Q. Who is Mr. Platfoot? A. Platfoot was the Eastern Divisional Sales Manager.

Q. And the Eastern Division included how many zones? A. It included, as I recall, seven zones.

Q. Was Baltimore within its jurisdiction? [1093] A. Yes, sir.

Q. Now, you were shown "work conference disclosed: Baltimore—(Webster)—price class—5.3 per cent." Did that refer to the Baltimore percentage of price class, or did it refer to something else? A. It referred to the city of Baltimore percentage of price class.

Q. It didn't refer to the metropolitan area? A. Yes, it would.

Q. It would? A. Yes, sir.

Q. Now, you got in parenthesis there "Webster". Do you notice that? A. Yes, sir.

Q. When you determine the price class for the metropolitan area, it is determined on consideration of sales made by all of your dealers in the area, isn't that right? A. That's right.

Q. Not to Mr. Webster alone? A. No, sir.

Q. All right. Then you have got classified under that:

> "Accounts receivable, used cars, trading, manpower needed, absorption, fixed expenses."

Does that mean that conference was held with regard to [1094] each of the categories in the classifications mentioned? A. Yes, sir.

Q. What does "absorption" mean? A. It means the amount of fixed expenses of the operation which can be absorbed through the gross profits from the service department.

Q. Is it a good thing or a bad thing that a dealer should be able to absorb his expenses? A. It's a good thing.

Q. A good thing? A. Yes, sir.

Q. So would he be a good dealer or a bad dealer who had the best absorption? A. He would be a good dealer.

Q. Now, Mr. Briggs, how did Mr. Webster take care of that, do you know? A. That meant that he had low absorption.

Q. Yes. Do you know how that had continued down through the years? A. I don't recall the figures.

Q. Do you recall now from your examination of the various reports which you received at the factory, how Mr. Webster's business showed insofar as absorption was concerned? A. My recollection is it was low.

[1095] Q. Low absorption. I show you a schedule showing absorption for eight months down through August, 1951.

* * *

Q. Now, absorption shows so far as Mr. Zell was concerned, what percentage? A. 58.7.

Q. And so far as Mr. Webster's is concerned? A. 42.4.

Q. And so far as that goes—— A. That's Washington.

[1096] Q. Save and except the—well, you just have Zell and Webster there, haven't you? A. That's correct.

Q. Is 42 per cent what you consider low? A. Yes, sir.

Q. And that's due to what reason, if you know? A. Not enough service business.

Q. You mean, service is service on the cars? A. Service on the cars, yes, sir.

Q. On the cars. Increased service? A. Increased service would raise the absorption, which was our objective.

Q. Now, if the absorption percentage is dependent upon the service charges, does it mean that the service charges

are either low, or that they are not enough? A. They are not enough.

Q. It may mean also that they are low, may it not? A. They could be.

Q. In that event it would be very beneficial to the public, wouldn't it? A. If the service rates were low, you say?

Q. Yes. A. It might be.

Q. (Reading from Defendants' Exhibit No. 15):

> "We as Packard are very weak in the city of [1097] Baltimore. Price class shows 5.3 per cent."

I am reading from page 4 of the exhibit which I just referred to, No. 15 for the defendant.

> "Price class shows 5.3 per cent, but this is a very little improvement over 4.8 per cent of last year. The April and May registrations will really give us a true picture. About a year ago, we visited Webster at the time of the salon showing——"

Do you recall what that was? A. No, sir.

> Q. "—and it was agreed that he was definitely in need of a used car lot and additional manpower, if we were going to get the business in the city. Mr. Webster still needs additional manpower and no attempt was made to get a used car lot. I requested Mr. Beck to see that this dealer gets a used car lot within the next 30 days. He now has a used car problem and I am sure that their price class will drop considerably and with his high variable gross profit per car of $1,017, you can see that there will be very little progress made, if any. In fact, the variable gross profit per car for the other two dealers is high also."

Now, you said that the gross profit was reflected in the method and manner of dealing in the used cars by the [1098] particular dealer, is that right? A. That is a part of it.

Q. In other words, he didn't give the buying allowance— he wasn't a loose trader that we saw in the other exhibit? A. That's right.

Q. In other words, for the interest of Packard, it was to get the dealer to give as much of an allowance as it could to attract a sale, to benefit Packard? A. And the public.

Q. Now, wait a minute. Does it benefit Packard? A. Yes, sir.

Q. How does it benefit the public? A. He buys at a lower price.

Q. He buys at a lower price. But were you looking for the benefit of Packard in asking for the loose trading or for your own business in order to get your cars on the market? A. We were looking to Packard's interests.

> Q. "This being a metropolitan area, I requested Mr. Beck to have a meeting with these three dealers and get an understanding as to whether or not they are going out to sell Packards or if it will be necessary for us to replace the dealer that we lost."

Who were the three dealers referred to there that he wants to get together? [1099] A. I am not sure. I assume it would be Webster. I can't answer that for sure.

Q. Now, you knew Webster's situation, didn't you, this morning and gave it to us very clearly? A. That's right.

Q. As a matter of fact this criticism is leveled at three dealers, isn't it? A. Some phases of it, yes.

Q. Yes. And your granting the wider allowances and not being quite so loose on the trading is something that Platfoot criticized the three dealers for? A. That's right.

Q. Not merely Webster? A. No.

Q. Now, then, don't you know who the three dealers were? A. I can't name them now, no.

Q. Wasn't Zell one? A. Oh, surely, Zell was one. I thought you meant beyond Zell and Webster.

Q. DeBaugh? A. I don't remember.

Q. You didn't have any others, did you? A. I don't remember.

Q. Don't you remember what the dealership situation [1100] was in Baltimore on June 13th of '51? A. No.

Q. Did you know that you had just let Schulte out? A. No, sir.

Q. Did you know that you had just refused to fill Schulte's place? A. That's a matter of record.

Q. Did you know it? A. Yes.

Q. Why didn't you say so? A. I did.

Q. Whose decision was it not to replace Schulte? A. Mr. Platfoot.

Q. Did you approve? A. Yes, sir.

Q. Then you knew about it? A. Yes, sir.

Q. What does Mr. Platfoot say to you in this letter? By the way, when did you refuse to fill Schulte's place? A. I am not sure about the date.

Q. Does January 11, 1952 or 1951 in any way refresh your recollection? A. It could have been. I am not sure about the date.

Q. I don't wish to be in error about that. I heard a whisper here that I was wrong as to the date, if Your Honor [1101] please. January 11, 1952. Does that help you? A. No.

Q. Well, at this time then Schulte was in business, wasn't he? A. I assume he was.

Q. Now, what does he mean then when he says:

> "I requested Mr. Beck to have a meeting with these three dealers and get an understanding as to whether or not they are going out to sell Packards or if it will be necessary for us to replace the dealer that we lost."?

A. I assume he meant Schulte, but I am not sure.

Q. Schulte was still in business on January 13, 1951? A. I don't know who he referred to.

Q. Was it Will Scott? A. It might have been.

Q. What did that mean to you when you read it? A. That meant to me that we were not getting the amount of business out of Baltimore which we had a right to expect, and that Platfoot was going to get these dealers together, whoever they were at the time, in order to work out some kind of a trading arrangement for more volume.

Q. Platfoot as the Eastern Divisional manager was engaged in just that sort of business, wasn't he, visiting the dealers and pushing them to do greater volume? [1102] A. That's right. That's his job.

Q. That was his job. And such letters as this which came to you dated June 13, 1951 from Mr. Platfoot, or whoever held Mr. Platfoot's position, were not unusual, were they? A. No, sir.

Q. In fact, that's what you at the factory sort of expected, wasn't it, that you would have your divisional managers keep behind these dealers in order to produce as much volume as possible? A. That's right.

Q. Do you know whether anything further was done with regard to this letter of June 13, 1951? A. No, I don't recall.

Q. I think you were also shown an exhibit signed by Everett G. McGill, manager, organization and analysis department.

The Deputy Clerk: 16A.

By Mr. Leahy:

Q. I will show you 16A. Do you recall that? A. Yes, sir.

Q. That was shown to you before you took the witness stand, wasn't it? A. Right.

Q. And was it marked as it is marked here now when [1103] you saw it? A. I assume it was.

Q. When did you see it, yesterday? A. Yesterday.

Q. And was this little corner notation on when you saw it? A. Yes, sir.

Q. "Chart 155. September 3, 1951. 19 terrible towns." In whose handwriting is the "19 terrible towns" in? A. I don't know.

Q. Don't you identify it? A. No, sir.

Q. Did you do it? A. No.

Q. Do you know the handwriting of Mr. Everett G. McGill? A. I wouldn't recognize it, no.

Q. You don't know who put that down? A. No.

Q. And you don't know why it was put down? A. Yes, sir, I do. That was a national promotional term that we were using for every town where Packard was not getting its share of business. That was not restricted simply to that area.

Q. Now, we have here the towns which you stated were in the 19 terrible towns, and you have the dealer point marked [1104] as the head of one column. You have Baltimore, Maryland three times, don't you? A. That's right.

Q. And you have Schulte Motor Sales, Incorporated, the Webster Motor Car Company, and Zell Motor Car Company, those three, don't you? A. That's right.

Q. Does that refresh your recollection now as to what under the earlier exhibit which I showed you was referred to by Platfoot when he said, "I suggest we get these three dealers together."? A. I would assume those are the three. yes, sir.

Q. Does that refresh your recollection as to whether Schulte was in business in June of '51 when you see the date here, September 3, 1951? A. Yes, sir.

Q. What was the amount in percentage of price class which you were getting in Baltimore? A. 5.1.

Q. Would you look down through the terrible town list and see how that 5.1 percentage compares with all of the other terrible towns? A. That's higher than most.

Q. Higher than all except College Park, Maryland, isn't it? [1105] A. They aren't all figured on this sheet.

Q. Well, all that figured. A. All that figured, that's correct.

Q. How did you determine what you expected you ought to get by way of price class in a given town? A. Well, at the beginning of the year we set up a yearly quota of the cars we must sell.

Q. Now, when you say "we," to whom do you refer? A. Packard nationally, to which is divided into the estimate for the industry to determine what our market penetration should be, and from there on we gauged as to areas, and as to national percentages.

Q. In other words, when you say you expect or have a right to expect, what you mean to say is that it is the projected percentage of the price class in a given case which you people thought you would like to get? A. That's right.

Q. And that was in comparison, was it, with these cars you told us earlier this morning? A. That's right.

Q. Now, then, I think you were shown—do you recall whether you were shown "Platfoot to Briggs zone and dealer contacts, dated September 24, 1951"? A. Yes, sir.

Q. Do you recall when you first saw that? [1106] A. I don't recall the date. It would be a few days after the date on here because it was addressed——

The Court: Do you know the number of that exhibit, Mr. Leahy? I think it would be helpful if the record would show that.

Mr. Leahy: Could you tell me which one that is?

The Deputy Clerk: That is Exhibit 17.

Mr. Leahy: Exhibit No. 17, Your Honor.

By Mr. Leahy:

Q. Do you recall when you first saw that? A. Yes. It was shortly after it was written.

Q. How was it brought to your attention? A. These are reports which I at the time was assistant general manager were directed to my office from the field.

Q. Did you direct your office to have all reports of this kind from all over the United States? A. Yes, sir.

Q. And you read them, did you? A. Yes, sir.

Q. You said there were 1,600 dealers, didn't you, in the United States? A. Yes, sir.

Q. And they are scattered all over the United States, aren't they? A. That's right.

[1107] Q. And how many reports do you require from your direct dealers? A. We require none in my office. They are required in our business management office, only a monthly statement.

Q. Only a monthly statement? A. Monthly financial statement.

Q. Do those monthly statements come to you? A. No, sir.

Q. Do you have them transmitted from the office to which they come? A. They are summarized and for overall national figures they are brought to our attention. Specific dealers which are in trouble are brought to our attention. We do not receive the reports as they are received from the field.

Q. But you do recall having seen this? A. Yes, sir.

Q. You notice that there was another heading there, Zell Motor Car Company, didn't you? A. Right.

Q. And that had to do with Schulte, didn't it? That report? A. This one does, yes.

Q. Did you know at that time that Schulte had tendered a mutual cancellation agreement? A. I don't remember that I knew it, no.

[1108] Q. Did you know what it was all about when it was first called to your attention? A. I knew about this, yes.

Q. Didn't you know what it referred to? A. I knew only what this memorandum states.

Q. If you don't know what went before, does it mean anything to you? A. Yes, sure.

Q. You tell us what it meant. A. Do you mind if I read it?

Q. Oh, no, no. What did it mean before? What was the prior history of the Schulte negotiations? A. I didn't know about that.

Q. You didn't know anything about that? A. No, sir.

Q. You didn't know, for instance, that Schulte had already tendered a mutual cancellation agreement which had been rejected by your zone office? A. No, sir.

[1109] Q. Didn't you know that? A. No, sir.

Q. Did you know Schulte was trying to get out of business? A. No, sir.

Q. Did you know Schulte had expressed his intention that he didn't want to represent Packard? A. No.

Q. Did you know that Schulte was advertising for a purchaser for his business? A. No, sir.

Q. Did you know that just shortly before that time, that date which that particular exhibit carries, September 24, 1951, that your representative from the zone office had been over there to Schulte's and had been investigating the prospective purchasers for the replacement of Schulte? A. No.

Q. Well, then how was it that that report happened to come to you with reference to Schulte, if no other reports had? A. I didn't say no other reports had been received.

Q. Had they? Have you a recollection that they have? A. I have no recollection of it.

Q. But you do have a recollection of this? A. Yes, sir.

[1110] Q. What stands out in your recollection about this one? A. Because this concerned a company at that time in the Baltimore area in which we were very interested. This was the first I recall of the information which we had that we were really in trouble in Baltimore.

Q. Trouble in what way? A. That we were not getting the amount of business we should be getting and that Mr. Zell was continuing to lose large sums of money.

Q. Hadn't you known before that time that Mr. Zell was continuously losing money? A. Yes, sir.

Q. Then what do you mean by that answer? A. I mean the fact that I did know he was losing money, and Zell Motor Car Company is referred to on here, would certainly make me remember it. It was one of the largest operations we had in the United States.

Q. Was there any other operation in the United States that constantly lost money at all times, regardless of size? A. Yes, sir.

Q. Where? A. I couldn't remember at the moment.

Q. Don't you know any of them? A. No.

[1111] Q. If there were any? A. No.

Q. But yet you can remember this one? A. Yes.

Q. Were you also in a hard way about getting dealers for Packard? A. Very much so. They were very difficult to get.

Q. And if your representative from the zone was interviewing purchasers of Schulte's business, in order to see if they qualified for being dealers, that would be in accordance with approved practice, wouldn't it? A. That is right.

Q. Because it was hard to get dealers, wasn't it? A. Right.

Q. And you didn't like to lose a dealer, did you? A. That is right.

Q. Was it also an expensive thing for the factory to change dealers? A. Very expensive.

Q. So there was every reason that you had at that time to keep your dealers and keep Schulte; is that right? A. Right.

Q. Now, let's see what Mr. Platfoot says:

> "Mr. Beck and I had a meeting with Mr. Zell in regard to the signing of three dealers in Baltimore. Mr. [1112] Zell was informed by Mr. Schulte, himself, that he has given us a mutual cancellation, and Mr. Zell felt that this was the time to bring up the subject of the number of dealers we should have in Baltimore."

What does that refer to, or what did that mean to you when you read it? A. It meant to me that Mr. Zell was

in trouble because he could not get enough volume to support his large operation, and he would like to have fewer dealers in Baltimore.

Q. Fewer dealers because then there would be less competition? A. No, sir.

Q. What would it be? A. Fewer dealers because there would be more volume for the business available to Mr. Zell.

Q. How would the more volume come about if there were fewer dealers? A. A certain volume divided up three ways would be more than divided up four ways.

Q. Will you answer the question, that what Mr. Zell wanted was to reduce his competition so that he could get all of the volume in Baltimore? A. He needed to get more volume in Baltimore.

Q. And the way he wanted to get it was to eliminate the competition of the other dealers; isn't that right? [1113] A. I think that is true.

Q. This tells you now what I had just asked earlier and you said you had no knowledge of, namely, that Mr. Schulte had already tendered a mutual cancellation, doesn't it? A. That is right.

Q. By the way, did you know that your zone office had recommended that Schulte's place be filled? A. Be filled with what?

Q. With another dealer. A. No, I didn't know that.

Q. You didn't know that? A. No.

Q. Don't those matters come to your attention? A. They possibly did, but with 1,600 dealers in the United States, and over 104 travelers, I couldn't be expected to remember those details.

Q. But this was a sore spot with you in Baltimore, wasn't it? A. We had lots of sore spots.

Q. Did you have so many sore spots that you can't remember anything at all about the Baltimore situation in regard to Schulte? A. I don't remember anything about the Baltimore Schulte situation.

Q. (Reading):——

[1114] "Mr. Schulte now has an ad in the papers to sell out his business."

Does that refresh your recollection now as to what I was asking you about? A. No, sir.

Q. "To sell his business"?

In other words, is it your testimony now that you had no knowledge that Mr. Schulte was trying to sell his business at that time? A. That is correct.

Q. (Reading):——

"However, it would be a sale to anybody that would appear on the scene, regardless of whether they were representing a competitive make of car. So, therefore, he appears to be holding Packard just until he makes a sale. I feel that it would be impossible for him to get a party interested in the Packard franchise in his present frame of mind because he has let it be known all through the city of Baltimore that it is impossible to make money with the Packard franchise."

Do you remember reading that? A. I remember reading it, yes, sir.

Q. Did the fact that Mr. Webster had constantly and consistently made money with the Packard franchise come to your mind then? [1115] A. I don't remember that it did.

Q. (Reading):——

"Although the zone had a mutual cancellation signed by this dealer, there was no date set as to when Mr. Schulte would give up Packard. I have requested that the zone get a definite date on this mutual cancellation."

Do you remember that? A. Yes, sir.

Q. Do you remember the fact that the cancellation came in later? A. No, sir.

Q. Didn't you know there was a mutual cancellation that came in from Baltimore, in accordance with this direction which I have just read on January 11, 1952? A. No, sir.

Q. Did you know that on that very date when the cancellation of Schulte came in on January 11, 1952, that Zell then tried to get you interested in eliminating all other dealers? A. I remember that Mr. Zell tried to get us to make him the sole dealer.

Q. When did you remember that he first brought that to your attention? A. My first recollection is in January, 1952.

[1116] Q. How long before the conference in New York on the 29th? A. That is the one I refer to.

Q. Didn't you know anything about that before? A. Yes, sir.

Q. When was it that you first learned, I asked you? A. I believe it was in the fall of '51.

Q. The fall of '51, about this time when he was trying to eliminate Schulte? A. I don't remember he was trying eliminate Schulte.

Q. Don't you remember he was trying to eliminate the Schulte franchise? A. No.

Q. Don't you know that a couple of days before this letter was written that he had had a luncheon in the Balti-

more Club at which he had Beck present, together with Platfoot, and there put it up to them squarely, the same proposition which he put up to you in New York? A. That is possible; I don't recall the details.

Q. You don't remember that? A. No.

* * *

[1117] Q. Let me go back for just a moment because I wanted to ask you with reference to your set up in Baltimore as between the dealers up to 1951 and through in fact the year 1951, from the time when you set up the dealer, direct dealer system, you will agree, won't you, that the competition between your own dealers was beneficial? A. To whom?

Q. To you? A. Yes.

Q. To the public? A. Possibly.

Q. Well, didn't you think about the public? [1118] A. Yes.

Q. You were interested in the public, weren't you? A. Yes, sir.

Q. Trying to get their good will? A. Right.

Q. And wasn't it a fact that you promoted competition and encouraged it among your own dealers? A. Well, yes.

Q. And you encouraged that competition in Baltimore, didn't you? A. That's right.

Q. And that occurred right down to at least the talk that you had in New York and the decision which you made in Detroit early in February? A. That's right.

Q. And when you made your decision you knew you were eliminating that competition which theretofore you had encouraged? A. That's right.

Q. And you were eliminating it, weren't you, to bring if you could Zell out of the red into the black? A. That was one of the reasons.

Q. And you figured, did you, that what Zell had said in the conference in New York that he would enlarge his facilities and put on more manpower and take care of the [1119] increased business? A. That's correct.

Q. Did he? A. Yes, sir.

Q. Did he increase his facilities? A. Yes, sir.

Q. What did he do? A. At the time of the New York conference, Mr. Zell was at the verge of giving up leases on property which as a result of our decision he continued to go on with the lease. He would have had smaller facilities had he not done that.

Q. In other words, what he said was he wouldn't re-execute the lease, isn't that right? A. I believe that's correct.

Q. Unless you made him sole dealer? A. That's right.

Q. And the lease was to expire in December, 1952, wasn't it? A. I don't remember the date.

Q. Now, you had quite a chat at that conference, didn't you? A. Within the time permitted, yes.

Q. Well, the time was an hour or an hour and a half, wasn't it? A. I believe it was.

[1120] Q. Within that hour and a half you certainly spoke and discussed more than what you told us this morning? A. Well, in more detail, yes.

Q. And you knew in advance why you were going to see Zell down in Baltimore, didn't you? A. No, he gave us—I think I had a pretty good idea what he wanted to talk about. We had nothing definite.

Q. Zell was always complaining to you about the fact he was in the red, wasn't he? A. That's right.

Q. And he was always complaining about the fact that there were more dealers in Baltimore than ought to be?

A. Not always, but in later months he was complaining about that.

Q. Way back in '51, the early part of '51, he was talking about it, wasn't he? A. Right.

Q. And he was talking about it when Samuel Braden was the manager here in the zone, wasn't he? A. That's right.

Q. And when you set Schulte up as a dealer, he complained about that, didn't he? A. He undoubtedly did.

Q. In other words, he was constantly complaining about the fact since '46 that he was not the sole dealer, isn't that [1121] true? A. No, not since '46.

Q. When was the first time that you know that Zell said to you that he would give up the franchise for selling Packards unless you reduced the number of dealers in Baltimore? A. The first time Mr. Zell definitely gave me that information was in January, 1952.

Q. Had he said anything about what he would do if you didn't agree not to replace Schulte?

* * *

[1122] A. I don't believe he did.

Q. You found out when Platfoot sent you that Exhibit 17, which you said that you read, that he had? A. That's right.

Q. What was he talking about then? I mean, Zell? A. Zell was talking at that time that he was losing money steadily and felt that he had to have more volume, and would like to have been the exclusive dealer or the only dealer in Baltimore.

Q. In other words, in September 24, 1951, you were advised as follows, weren't you, by Mr. Platfoot:

> "Due to the fact that Mr. Zell is familiar with this mutual cancellation from Schulte Motor Sales——"

Do you know how Zell would get the information that Schulte had executed a mutual agreement with the zone? A. I assume it would be common gossip among the trade in Baltimore. That would be usual.

Q. Was it common gossip that you were going to make Zell the sole dealer in Baltimore? [1123] A. I couldn't answer that.

Q. Could you assume it for us? A. No.

Q. But you do assume that it was common gossip that Zell had the mutual cancellation from Schulte Motor also in his knowledge? A. No, I didn't say that. I said I assumed that a major dealer in Baltimore had given up the line and cancelled would become common gossip among the trade.

* * *

[1124] Q. (Reading):—

> "He was very much interested in knowing whether we were going to put another dealer in Baltimore because he wanted to make his plans immediately."

Do you remember that? A. Yes.

Q. (Reading):—

> "By that he meant that he would give up the Packard franchise because year to date the return on his investment has been very small, and with the possibility of a shortage of cars, he feels he would lose money."

What do you refer to there "with the possibility of a shortage of cars"? Do you know? A. I don't know.

Q. Was there a shortage of cars at that time—— A. No, sir.

Q. —so far as Packard is concerned? A. No, sir.

Q. (Reading):——

[1125] "He assured us that if we would go along for the present time with only two dealers and not install a third one, he would set up an organization with our assistance and would make up the 100 cars that Schulte had sold this year."

Do you remember that? A. Yes, sir.

Q. Did you go along with him? A. I believe the decision—yes—Mr. Platfoot made the decision at that time not to replace Mr. Schulte.

Q. And of course you approved it? A. Yes, sir.

Q. And you had to approve it in order to make it effective, didn't you? A. No.

Q. Did Platfoot have a right to refuse to fill Schulte's place? A. Yes, sir.

Q. (Reading):—

"He showed us that 60 per cent of what Mr. Schulte had sold were prospects of his."

Do you remember that? A. Yes, sir.

Q. Pretty keen competition, wasn't it? A. Right.

[1126] Q. (Reading):—

"He also agreed that if this did not prove satisfactory to Packard, he would then feel better about a third dealer in Baltimore and would go along with us on any future program that would be necessary to get our share of the business in Baltimore. The price class in Baltimore as of July is 5.1 per cent."

I think you said that Mr. Platfoot—without taking the time of reading all of this—agreed with Zell not to fill Schulte's place. A. No, sir, I did not say that. I said Mr. Platfoot made the decision not to replace Schulte. That

had nothing to do with any agreement he might have made with Zell.

Q. Well, now, let's examine that. In other words, you say that at this time when Zell was telling you that if you didn't refuse to fill Schulte's place he would go out of business—isn't that right? A. Right.

Q. What? A. That is right.

Q. And he told you that? A. No. It was in that report.

Q. Did he tell your official? [1127] A. That is right. I assume he did.

Q. But you say that Mr. Platfoot didn't agree with him on that? A. Didn't agree with who?

Q. Zell. A. He had no agreement with Zell.

Q. All right. Let's find out whether he did or not.

(Reading):—

"This I agreed upon."

Do you want to change your testimony? A. No, sir.

Q. Take a look at it and read it (handing document to the witness). A. I assume from this that what he agreed——

Q. Read the thing through and see if you want to change your testimony. A. What do you want me to read?

Q. What I just gave you. A. Well, which part?

Q. I will read it to you and then we won't have any wasted time.

* * *

[1129] Q. (Reading):—

"I believe Mr. Briggs will agree that it is rather difficult due to the uncertainty of the times to get a new dealer as large as Mr. Zell."

Do you agree to that? A. Right.

Q. (Reading):—

> "I am sure that in losing Mr. Zell we would lose a great deal of prestige and very likely would not be able to get the facilities that Mr. Zell now has."

Isn't that what you told us this morning? A. Right.

Q. That was your answer and your reason for making your decision after the conference of January 29th? A. Yes, sir.

Q. All right. (Reading):—

> "Mr. Zell was very serious in his conversation and said that we have never given him an opportunity to show us that his organization can maintain Packard price class, and he felt that he was at least entitled to this request, and if it could not be done, he would bow out graciously. This request has come up before from Mr. Zell, and it has been in his mind for a considerable length of time."

Now, do you remember that he was complaining always [1130] that he was in the red and wanting to reduce the number of dealers? A. I didn't say that. I didn't remember it.

Q. Well, I thought you did, Mr. Briggs. We will leave it with the jury. (Reading):—

> "This request has come up before from Mr. Zell, and it has been in his mind for a considerable length of time. I am very sure that he was most serious in his decision in relinquishing the Packard franchise."

Do you remember that now? A. Yes, sir.

Q. And did you feel, too, in the same way which Mr. Platfoot felt in his report as he wrote to you? A. Yes, sir.

Q. (Reading):——

"This I agreed upon"——

Do you remember that? A. Yes, sir.

Q. (Reading):——

". . . and I am sure that I am correct."

You thought he was correct? A. Right.

Q. (Reading):——

"Under the circumstances, I agreed with Mr. Zell and Mr. Beck not to appoint another dealer in Baltimore"——

[1131] Did he agree? A. That is what it says.

Q. That is what you said he didn't do, isn't it? A. I said I didn't agree. We had no—may I explain that, Mr. Leahy?

Q. Yes, sir; I will be happy to have you. A. When that came to our attention there was a decision to be made. We made no agreement with anybody. The decision was on the part of the Packard Motor Car Company executed by Mr. Platfoot not to replace Mr. Schulte. That did not constitute an agreement with Mr. Zell.

Q. You just told us, didn't you, that Mr. Platfoot had full authority? A. Yes, sir.

Q. Listen carefully (Reading):——

"I agreed with Mr. Zell and Mr. Beck not to appoint another dealer."

Is that an agreement or not, in your judgment? A. I don't know.

Q. All right. "I agreed with Mr. Zell and Mr. Beck not to appoint another dealer in Baltimore for the present, and, therefore, give Mr. Zell the opportunity to prove that he can do the job." Do you remember that? A. Yes.

[1132] Q. But you still maintain, do you, that there was no agreement as stated in here? A. I am not sure.

Q. Did you ever appoint anybody to take Mr. Schulte's place? A. To my knowledge we did not.

Q. Now, do you remember that it was January 11th, following this letter of September 24th, that Mr. Schulte completed a mutual cancellation agreement? A. No.

Q. You don't remember that? A. No, sir.

Q. Do you now remember that on the very day that Zell had accomplished that agreement that he wrote you for a meeting in New York?

Mr. Denit: We object to that as not a correct statement of the evidence at all.

Mr. Leahy: Will you get me those two exhibits?

The Court: I think this is proper cross-examination. I will overrule the objection.

* * *

[1134] Mr. Leahy: Would you get me that letter from Zell to Mr. Briggs after the compliance of the elimination of the other dealers?

By Mr. Leahy:

Q. Oh, yes. "And just as soon as the Schulte dealer is terminated, he will build up his organization to fulfill all requirements." Do you know whether he did? A. I believe he did.

Q. "In making this decision he had in mind the possibility of a shortage of cars and also that our present

agreement expires in March, 1952." Now, this is September 24, 1951. That's right, isn't it? His agreement expired in March, 1952? A. That's right.

Q. "And this too will give Mr. Zell a reasonable time to show us that he can do the job." Do you remember that? A. Right.

[1135] Q. Did you agree with it? A. Yes.

Q. That Zell ought to within the six months or whatever it may be from September to March, Zell should be able to prove to Packard that he could do what he said he would do here, catch up the 100 cars that you were losing because of Schulte's termination? A. Well, we had no definite period of time in mind.

Q. I see. You were willing to give him from now, is that right? A. No definite period.

Q. "Mr. Zell was very emphatic upon the agreement that we could go ahead and get another dealer if we felt it necessary." Do you remember that? A. Yes, sir.

Q. But you didn't did you? A. I don't believe we did.

Q. You know you didn't, don't you? A. I don't know what period you are talking about.

Q. Oh, dear. We are talking about September 24, 1951. A. All right. For what period would we agree we wouldn't put in a dealer?

Q. From September 24, 1951. A. Until when?

[1136] Q. Until anytime in Schulte's place? A. No, we did not replace him.

Q. "However, the city of Baltimore seems to be in a slump, at least for Packard. The first ten days of this month shows that Mr. Zell delivered three cars, and the second, two cars; Webster delivered one the first ten days, and three the second ten days; and Schulte delivered four the first ten days and two the second ten days. Of course,

Mr. Schulte is giving long trades to sell the balance of his new cars." "Long trades" means "loose trading" does it, as we described it this morning? A. Yes, sir.

Q. That met with your approval, didn't it? A. Yes, sir.

Q. "But on the whole, Baltimore has not felt too much of an increase in business. Both Mr. Webster and Mr. Zell said that they have not seen business so slow for a considerable length of time. However, both of these men claim that they have quite a few prospects ready to sign but just can't seem to get them to take their cars. They do feel, however, that just as soon as competition posts their new prices, Packard will get a considerable amount of new business. Zell has 46 new cars on hand, and he agreed that [1137] his stock is not heavy. I advised him that it will be necessary for him to take approximately 30 or 40 more cars from us to start to fulfill the job that he will be responsible for in taking over the third dealer's share of the business." Do you remember that? A. Yes, sir.

Q. The terms were pretty well stated, weren't they? A. I think so.

Q. "This he agreed to do. Just as soon as the zone receives the dated cancellation of Mr. Schulte's agreement, a letter will be sent to him by Mr. Beck requesting his return of new material according to our sales agreement. In reviewing Mr. Schulte's situation again, I find he is not doing Packard any good and the quicker we divorce ourselves from this operation, the better off we will be here. I understand that he had contacted every competitive make of dealer, giving them the story he is giving up Packard and trying to rent his building. It is too bad that this came about because Mr. Schulte has nice buildings and facilities, but I believe we have no alternative, as much

as I hate to lose any dealer today." Do you remember that? A. Yes, sir.

Q. There were good facilities and good buildings, weren't there? [1138] A. Right.

Q. And yet you shut him off at Mr.—— A. We didn't shut him off. He quit.

Mr. Denit: We object to that. There is no evidence——

Mr. Leahy: I meant shut the area off.

The Court: Objection sustained.

By Mr. Leahy:

Q. You shut that franchise off? A. No.

Q. At the request of Mr. Zell, didn't you? A. No, sir.

Q. At whose request did you do it? A. We shut the franchise off Schulte at the request of Mr. Schulte.

Q. I said, "You shut the franchise off for that area," whatever the dealer was? A. Yes. That was our factory decision.

Q. In other words, you made it closed point, as you call it, don't you? A. No, sir; that is a little different definition. To put I think what you want, we did not reappoint a dealer there.

Q. You did not what? A. We did not reappoint a dealer in that area.

[1139] Q. That is right. Isn't that true? A. That is right.

Q. And it was at Zell's request? A. Well, Zell had requested it. We did it as a purely, on a basis of good business for Packard Motor Car Company.

Q. And it had nothing to do with Zell? A. I would say it had something to do with Zell, sure.

Q. You just told us you wanted to get Zell out of the red, if you could, and into the black. A. That is right.

Q. Yes. Now, I am going to hand you what has hitherto been marked, identified and accepted in evidence as Plaintiffs' Exhibit No. 33. I want you to read that very carefully.

(Witness read Plaintiffs' Exhibit No. 33.)

Q. Have you read it? A. Yes, sir.

Q. Do you remember it? A. Yes, sir.

Q. Was that addressed to you? A. Yes, sir.

Q. And it is dated February 13, 1952, isn't it? A. Right.

Q. Do you recall whether in between the dates [1140] September 24, 1951 and February 13, 1952, that Mr. Zell had caught up the slack and built up his organization in accordance with what he represented, according to Mr. Platfoot? A. No, sir, I don't remember that.

Q. Do you remember now that on February 13, 1952, after you had made the decision to make Baltimore a one-dealer city, and to make Zell the one dealer, that he wrote and said:

> "I want to thank you and your associates for the confidence placed in me, and to assure you barring conditions beyond my control your trust is not misplaced. The opportunity now given is deeply appreciated. We have already taken steps to augment and strengthen our organization."

Do you remember that? A. Yes, sir.

Q. For what? A. What do you mean?

Q. Why was it necessary for him to augment and strengthen his organization? A. That was a part of the

consideration we had with him if we were to make him the sole dealer in Baltimore.

Q. How much did he say he was going to strengthen and augment? A. I don't remember all the details.

Q. You went over the whole thing very carefully, [1141] didn't you? A. Yes, sir.

Q. It was a very important decision you were making, wasn't it? A. It was.

Q. You knew that if you agreed to what Zell had said in the conference that you were going to eliminate Mr. Webster, didn't you? A. Yes, that's right.

Q. And you determined to eliminate Mr. Webster some time between the date of the conference which was January 29, and February 11, 1952, isn't that right? A. You mean the decision was made then?

Q. Yes. A. That's right.

Q. And you made the decision, didn't you? A. That's correct.

Q. Now then you knew that Mr. Webster had been connected with your company in one way or another since 1925 didn't you? A. That's right.

Q. And you knew he had been a dealer either under Zell or direct to the factory since 1937, didn't you? A. That's correct.

Q. Now then taking into consideration the importance of that decision which you had been called upon to make, [1142] don't you recall what Mr. Zell agreed with you to do if you would do that thing? A. I recall the highlights of it. First, he was to renew the leases on his facilities to maintain service. He was to increase his organization, salesman power-wise, the number of salesmen at the moment I can't recall. He was to guarantee to us or try to give us a larger percentage of the Packard business in Baltimore

as a sole dealer than we had been able to get with two dealers. Those are the highlights of the agreement.

[1143] Q. And in September of 1951 and in that document here he speaks about the fact that he thinks that if you will not replace Schulte, that he and Mr. Webster can take care of the business, isn't that right? A. I think that was the assumption, yes.

Q. He stated that, didn't he? A. Yes.

Q. So in September preceding the January he felt certain he could increase his organization so that he and Mr. Webster could take care of the business of Packard in Baltimore? A. I think that's true.

Q. Isn't that right? A. I think that's right.

Q. And they could recapture the hundred sales which Schulte was making a year? A. That's right.

Q. The two of them together? A. That's right.

Q. Now, he said to you in New York, I want to be the only one in Baltimore, didn't he? A. That's right.

Q. And he again said, If you will make me that only one I will do this, that and the other thing? A. That's correct.

Q. And you said, I will take it under consideration [1144] and let you know? A. Right.

Q. He wanted you to let him know within two weeks, didn't he? A. I assume he did.

Q. And he used the necessity for speedy action the fact that he, Zell, had a decision too to make, to wit, to determine whether he would renew the lease? A. That's right.

Q. Which was coming due on December 31st, isn't that right, of 1952? A. I don't recall the date.

Q. Well, you knew about the lease, didn't you? A. Yes, sir.

Q. Had you been in the property leased? A. I had been in it at the time I made my visit there, yes.

Q. "By April 1st or before we shall be fully prepared." Did he tell you there that he was going to be fully prepared in the augmentation of his business and the strengthening of his organization by April 1st? A. I didn't try to interpret his meaning, but I would assume that is what he meant.

Q. Because his agreement expired with you on March 31st, isn't that right? [1145] A. That's correct.

Q. And in anticipation of it was, that by the time the agreement had expired, that he would be ready to go forward as the sole dealer in Baltimore, if you concluded to make it that way? A. I assume that to be correct.

Q. Do you recall whom it was you told that you had decided to make Baltimore a one dealer city? A. Yes, sir.

Q. Who? A. Mr. Abernethy.

Q. And did you at any time advise Mr. Beck? A. Not directly, no, sir.

Q. Did you know whether or not Mr. Beck had received a telephone call from Mr. Zell to find out whether you in Detroit had come to a conclusion in the matter? A. It could possibly be. I don't recall the incident, but that could possibly be.

Q. Do you recall that Mr. Beck actually called long distance from Washington to Detroit to verify the fact, if it be a fact, that you had come to a decision? A. Yes, sir.

Q. You knew that? A. Yes, sir.

Q. And you told him Yes? [1146] A. No, I didn't.

Q. Who did? A. Mr. Abernethy.

Q. But your instructions to Mr. Abernethy were to go ahead and make Baltimore a one dealer town? A. Right.

Q. Now, there came a time when you also gave instructions to Mr. Abernethy again with regard to what should be done because of a letter which you received very shortly after this letter from Mr. Zell, didn't you? A. I

believe that's true. I don't remember the length of time.

Q. This is dated February 13th, isn't it? A. That's right.

Q. And it states here:

> "Marshall Beck Monday advised me that he has received the green light to proceed along the lines we discussed in New York on January 29th."

Now, this February 13th is a Wednesday, isn't it? A. I don't know.

Q. Was a Monday. Would be February 11th, wouldn't it? Would be the date now that you recall that you announced your decision? A. The decision was probably announced—I don't remember the exact date. It would be just shortly before that [1147] letter came from——

Q. Shortly before that letter. Do you recall that just shortly thereafter that a letter was brought to your attention—I am going to show you a personal and confidential letter from Mr. Beck dated February 14th—— May I get the number of that exhibit so that the record will be straight? It is a letter from Mr. Beck to Mr. Webster.

Mr. Webster: It is Plaintiffs' No. 9.

By Mr. Leahy:

Q. Do you remember that letter or a copy of it or seeing it? A. No, sir.

Q. You never saw it before? A. I don't recall seeing it.

Q. It wasn't shown you by your attorneys? A. It could have been. I am not sure about that.

Q. Do you remember seeing a memorandum from Mr. Armstrong directed to you with the request that you tear it up or destroy it as soon as you finished reading it? A. Yes, sir.

Q. Is that it, Exhibit No. 110? A. Yes, sir.

Q. What were you afraid about that memorandum for? [1148] A. I didn't write it.

Q. Well, you didn't destroy it, either, did you? A. It wasn't mine.

Q. Wasn't it directed to you? A. No.

Q. You didn't see it? A. I saw it.

Q. Did you agree that it ought to be destroyed? A. I didn't even think about it.

Q. Didn't you discuss it? A. I didn't discuss that part of it, no. We discussed the contents of it.

Q. With whom? A. Mr. Abernethy, Mr. Armstrong.

Q. Who was Mr. Abernethy? A. He was my assistant general sales manager.

Q. He was right down the hall from you, wasn't he, so far as his office was concerned? A. Yes, sir.

Q. Doesn't that memorandum which is Plaintiffs' Exhibit No. 10 refer directly to the letter dated February 14th, which is Plaintiffs' Exhibit No. 9.

The Court: Is it 10 or 110?

Mr. Leahy: 110. Thank you, Your Honor.

The Witness: That could be the letter he refers to. [1149] I am not sure. It is the same date.

By Mr. Leahy:

Q. Isn't it the same subject matter? A. Yes. There may be other letters of the same subject matter. I think that is the one. I am not sure.

Q. What were you discussing when you discussed the memorandum which the Court now has, Exhibit 110? A. We were discussing the fact that Mr. Beck, our zone manager had apparently, it seemed to us, had committed us to

another contract with Webster Motor Car Company in Baltimore.

Q. What does the letter which you got in front of you, Exhibit 9, dated February 14th, Beck to Webster, talk about? A. Do you wish me to read it?

Q. Haven't you read it already? A. Yes, I have read it.

Q. Then what does it say? Doesn't it talk about that very thing? A. Yes, I will say it does.

Q. It surely does. A. Yes.

Q. Do you recall ever having seen any other memorandum, letter, or did you ever receive any telephone call, or did you have any discussion with any of the officials at Detroit [1150] on any matter whatsoever other than what you see in this letter with reference to the memorandum, Exhibit 110? A. That?

Q. Yes. A. It was taken up with our legal counsel at that time.

Q. I am asking you the question whether you had any discussion with anybody else about the contents of this letter dated February 14th. A. None other than Mr. Abernethy and Mr. Armstrong.

Q. I don't think you told us who Mr. Abernethy was. A. He was my assistant general sales manager.

Q. Now, in the letter of February 14th it says:

> "This will confirm the conference held yesterday with you, Mr. Porter and the writer."

So that "yesterday" would be February 13th, the same day that Mr. Zell was writing you thanking you for coming to the decision which you made. Isn't that right? A. Correct.

Q. "It was the consensus of opinion that because of the existing circumstances in your Packard dealership in Baltimore, Maryland, that your best interests could be served by the liquidation of this dealership, thereby terminating your Packard franchise. We want you to know, Dick, that Mr. Porter and myself will do everything [1151] possible in assisting you to carry out this program. In order that we will be able to chart our future in Baltimore, we would like to set July 1, 1952, as the deadline or the latest date for the termination of your Packard dealer sales agreement."

Is that what caused you to refer that to your legal counsel? A. Yes, sir.

Q. Legal counsel in Detroit? A. Yes, sir.

[1152] *By Mr. Leahy*:

Q. You had house counsel there, did you? A. We had general counsel.

Q. General counsel? A. Yes.

Q. They did not have their offices in the same building with you? A. No, sir.

Q. And you referred that to them because you considered that perhaps in the last paragraph which I just read to you that Mr. Beck had said something which might embarrass the Packard with reference to the termination date, or a renewal of the agreement? A. That is right.

Q. Well, Mr. Beck didn't have any authority to renew, did he? A. No, sir.

Q. Well, how could he do anything that would cause you to put this over into the hands of your counsel? A. As a representative of the Packard Motor Car Company in

charge of the Washington Zone. We stand behind the commitments, usually, of our people, and we felt that he had made a commitment, at least an implied one there.

Q. What was there in the language that caused you to come to the conclusion that he had made a commitment [1153] there? A. Because he extended it beyond the expiration date.

Q. How did he say that? A. He said:

> "In order that we will be able to chart our future in Baltimore, we would like to set July 1, 1952, as the deadline or the latest date for the termination of your Packard sales agreement."

Q. The Packard sales agreement in evidence here—and I think you know it pretty well, don't you? You remember the agreement, don't you? A. Yes, sir.

Q. When a sales agreement has been terminated, and there has been a refusal to renew the agreement, the agreement by itself carries a definite time within which the mutual affairs between Packard and the dealer terminate; isn't that right? A. That is correct.

Q. Isn't that what he is referring to? A. Yes, sir.

Q. That doesn't renew the agreement, does it? A. I am not sure whether it does or not.

Q. You were a little bit afraid of a lawsuit on account of what you had done in coming to that decision, weren't you? [1154] A. No, sir; I don't think so, personally. I thought we had implied there another year's contract with Webster Motors.

Q. Did you tell your counsel what you had done with reference to cutting loose all other dealers in Baltimore? A. Oh, I am sure that was done, yes.

Q. It was? A. Yes.

Q. And you thought even as early as February 14th, or shortly thereafter, that the matter ought to be handled as a legal and not as a commercial matter, you stated. Is that right? A. That is right.

Q. Is that right? A. That is right.

Q. And of course other counsel beside your local counsel in Detroit took up this question with you after the lawsuit was filed; isn't that right? A. I think that is correct.

Q. And you gave whatever assistance you could, didn't you, to those counsel? A. That is right.

Q. You knew, for instance, that interrogatories had been put to your company, didn't you? A. That is right.

[1155] Q. And you knew those interrogatories were answered, didn't you? A. That is right.

Q. Did you know that somehow in the answer to one of those interrogatories those two adjectives were used "commercial" and "legal"? A. No, I didn't.

Q. Did you know you just got them mixed up in your answer? A. No, I didn't.

Q. You didn't know that? Let me read you the interrogatory, and then let me read you the answer. The interrogatory is No. 75, and it reads as follows, and I am reading from page 20. It refers back to interrogatory No. 74:

> "Following the receipt of Mr. Leahy's letter were there any discussions among Packard representatives as to what should be done with respect to Webster?"
>
> "75. If your answer to the preceding question is in the affirmative, please state when and where the discussion occurred, who was present, and what was said. If the discussion and the conclusions were doc-

umented in any way, please attach copies of the documents, or state where they may be."

* * *

[1156] Q. * * * In the amended answer it reads:

"Following receipt of the letter Messrs. Armstrong, Abernethy and Briggs discussed the Webster situation in Detroit. It was assumed what Webster wanted was a renewal amendment of its dealers sales agreement, and [1157] that if one were offered the matter would be at an end. It was decided that the matter should be treated as a commercial rather than as a legal matter, and that Messrs. Armstrong and Abernethy should endeavor to have a renewal amendment signed.

"Paragraph 5 of the order entered here December 10, 1955 provides," and so forth; that is with relation to the documents.

Do you remember giving any instructions about having the Webster matter treated as a commercial rather than as a legal matter? A. At the time Mr. Abernethy and Mr. Armstrong came down here to meet with those gentlemen it was strictly a commercial deal.

Q. When had you ceased to consider the matter commercial rather than legal? A. It was commercial as far as I was concerned up until the time they refused to sign our agreement.

Q. It wasn't commercial when you said, Turn it over to your lawyers, was it? A. Yes, I would believe so. That is routine business with us. As these matters come up that is what they are for; we have many matters which we consult counsel on.

Q. But you did turn this matter over to your lawyers in Detroit? [1158] A. We probably sought advice from them.

Q. You know what you did. Tell us what you did. A. I do not, no, sir.

Q. In your answer you stated you gave instructions to Abernethy to close out all dealers except Zell and make Baltimore a one dealer town? A. That is correct.

Q. And turn the matter over to the lawyers? A. No, sir.

Q. That you considered it legal and not commercial? A. No, sir, I didn't say that.

Q. After the letter of February 14th? A. I don't remember the exact date. We did decide finally it became a legal and not a commercial matter at the time Mr. Abernethy was given the decision it was regarded as a commercial matter.

Q. Why did you refer the letter of February 14th to the attorneys? A. I referred it to Mr. Abernethy. I think he in turn did refer it to the attorneys.

Q. You referred it to Mr. Abernethy, according to your testimony this morning; isn't that true? A. That is right.

Q. With instructions to turn it over to the lawyers? A. I may have.

[1159] Q. Don't you recall what you said to the jury this morning? A. I think I did say that.

Q. You know you did, don't you? A. I probably did.

Q. Why did you turn the letter over to the lawyers, dated February 14th? A. For the reason we felt that the last paragraph of that letter committed us to another year's contract.

Q. A year? A. A year, yes, because we make no part-time contracts.

Q. Did you instruct Mr. Beck to offer a contract for a year when he went down on the 3rd day of April to Deal Island? A. He was instructed at one time, but I don't recall just what the time was.

* * *

[1160] Q. What was the instruction you gave Mr. Beck when you sent him down to Deal Island? A. We didn't send him down.

Q. Well, all right—when he went to Deal Island. A. We gave Mr. Beck no specific instructions whatever on this. We gave him the decision that we were going to go the sole dealer route in Baltimore, and the execution of that was in his hands.

Q. Did you instruct him though as to the date at which there should be a termination of his franchise when he went [1161] to Deal Island? A. I don't believe so.

Q. Don't you know that you told him to try to get him to sign up to July 1, 1952? A. We never gave him any such instruction. Those were not the instructions of Packard Motor Car Company. Those were what Marshall Beck did at the time he went down there.

Q. So that Marshall Beck at no time received any instruction from Detroit that he should go to Deal Island and try to get a renewal with a terminal date of July 1, 1952? A. That is absolutely right.

Q. From nobody did he get such instruction in Detroit? A. No, sir.

Q. Do you know that Beck has sworn that he did? A. No, I didn't know he did.

Q. Does it change your mind any? A. No, sir.

Q. Do you know what agreement was offered to Mr. Webster at Deal Island on the 3rd of April? Do you? A. What was the last question?

Q. Did you know what the date was in the agreement which was submitted to Mr. Webster for his execution on the 3rd day of April, at Deal Island? A. No, unless it was the report which Beck wrote in [1162] and said he offered the copy of the letter to Webster in which he stated July 1st. That's the only date I know anything about.

Q. He made a report to you, didn't he? A. That is the one.

Q. Then you did know he had offered July 1st as the terminal date? A. Only when we received a copy——

Q. I don't care how you knew it. Did you know it? A. We knew he had offered him a contract of July 1st.

Q. You knew he had offered a contract to Mr. Webster terminal on July 1st, and I am showing you Plaintiffs' Exhibit No. 102 (handing document to the witness). Is that right? A. That is right.

Q. Now, do you say that Mr. Beck without any authority attempted to make the same mistake he had made in the letter of February 14th and again fix another date? A. Mr. Beck was given no instructions whatever from Detroit except not to renew the Webster agreement.

Q. When did you give him the instruction not to renew it? A. I believe they were the early part of February. I am not sure about the date.

Q. Then you don't know why he went down here to Deal Island at all? [1163] A. No, sir.

Q. Did you know he was going? A. No, sir.

Q. So he went wholly on his own? A. He certainly did.

Q. And it was wholly on his own that he inserted July 1st? A. Right.

The Court: Will counsel come to the bench, please?

(At the bench:)

The Court: It seems to the Court that Marshall Beck, as zone manager, or assistant zone manager, one or the other, did have sufficient authority to represent the company.

Mr. Leahy: He said he didn't.

The Court: He said he had no instructions.

Mr. Leahy: No. I asked him if he had authority to make the date.

The Court: I would say he had ostensible authority. In other words, I think his act would bind the company.

Mr. Leahy: I think so too.

The Court: I was just making that suggestion because I was wondering why you felt it necessary to pursue this line of inquiry.

Mr. Leahy: Only because Mr. Beck had sworn to the contrary and I wanted to test this man's veracity.

[1164] The Court: I am not precluding you; I am just making that as a suggestion.

Mr. Denit: The fact is the man is just confused about the two visits, Salisbury and Deal Island.

Mr. Leahy: How do you know?

The Court: I think the story is clear in the Beck deposition anyway.

Mr. Smith: This witness thinks that Mr. Leahy is asking him about Beck's trip to Salisbury, and he doesn't recognize that Salisbury and Deal Island are different, and he doesn't know or doesn't recall about the Deal Island trip.

The Court: We have everything in the record here from the Beck deposition.

Mr. Smith: The witness is confused.

Mr. Leahy: I think he is very confused, Mr. Smith.

Mr. Smith: He is confused just because he thinks you are talking about a different trip.

The Court: This witness impresses the Court as a very clear thinker, on the contrary.

Mr. Smith: But I think Mr. Leahy is talking about a different trip.

(In open court:)

By Mr. Leahy:

Q. I want to see if I can't refresh your recollection. Are you confused with reference to trips? [1165] A. Which trips do you mean?

Q. Are you confusing Deal Island with a trip to Salisbury? I don't want you to be confused. A. I don't believe I am.

Q. No, I didn't think you were. This was asked—going back to Interrogatory 70:

> "If your answer to the preceding interrogatory is in the affirmative please state (a) by whose order or direction these men went to Deal Island for the interview."

The preceding question is this:

> "Did Mr. Beck and C. M. Porter and Ben Marnocha, all of Packard, interview Richard Webster at Deal Island, Maryland on April 3, 1952?"
>
> Interrogatory No. 70: "If your answer to the preceding question is in the affirmative please state by whose order or direction these men went to Deal Island for the interview."

"70(c): What were the instructions; from whom had they received them, and how had they been transmitted?"

Answer to 70(c):

"Mr. Abernethy and Mr. Armstrong had instructed Mr. Beck by telephone to offer Webster a renewal with a July 1, 1952 termination date."

[1166] Does that refresh your recollection? A. Now, I am confused between the two trips. The first trip was when they went down, and as a result of that wrote the letter offering him the——

Q. February 14th? A. Yes.

Q. Yes? A. Is that still the one you are referring to?

Q. I asked then whether or not on April 3rd anyone had given any direction to offer a renewal with a July 1, 1952 termination date. A. They were given instructions to offer a renewal, but to my knowledge that renewal was to be for a year.

The Court: Mr. Leahy, these answers to the interrogatories I observe are sworn to by a vice president of the company.

Mr. Leahy: Yes, sir.

The Court: In any event they are binding on the defendant, having been filed by the defendant.

Mr. Leahy: Thank you, Your Honor.

* * *

[1167] Q. Mr. Briggs, I think you were shown this morning the letter of January 2, 1952, which I showed you earlier on the examination, from Mr. Marnocha to Mr. Schroeder. A. Yes, sir.

Q. That is Defendants' Exhibit 16. And you were asked the question as to what that letter indicated to you with regard to Mr. Webster. [1168] I understood you to say that it gave you the opinion Mr. Webster was not a satisfactory dealer; is that right? A. That is correct.

Q. Does it give you the same with regard to Zell? A. Yes, sir.

Q. I think you stated that you had come to Washington on April 16th, or thereabouts, at a convention that was held here in town. A. Yes, sir.

Q. Do you recall Mr. Zell being present? A. Yes, sir.

Q. You discussed this Webster situation with Mr. Zell, did you not? A. Yes, sir.

Q. You also discussed with him, didn't you, about it might be necessary to give Mr. Webster a renewal contract until March 31st? A. Yes, sir.

Q. And do you recall whether any understanding was had with Mr. Zell then? A. No, sir.

Q. You do remember, however, the discussion? A. I should say, however, I do recall——

Q. I am sorry. [1169] A. There was no understanding with Mr. Zell at that time.

Q. Do you recall getting a letter from Mr. Zell about that matter? A. Yes, I do.

Q. I am going to show you a letter dated May 14, 1952, which has been introduced as Plaintiffs' Exhibit No. 41. Would you look that over, Mr. Briggs, and I will ask you if you received the original of that letter. A. Yes, sir.

Q. It asks you in turn for a letter, does it not? A. That is right.

Q. Did you ever send it to him? A. No, sir.

[1170] Q. Did you get in touch with Mr. Zell after the receipt of this letter by telephone? A. No, sir.

Q. Did you instruct anyone else to do so? A. No, sir.

Q. Nothing whatsoever was done at any time with regard to that? A. Yes, I believe there were discussions between Mr. Zell and the zone people after the situation in Baltimore, but no conversation between Mr. Zell and myself.

Q. But with other officials in Detroit? A. Could be. I assume there were.

Q. Did you get a report about them? A. No, sir.

Q. So you don't know anything that was said with regard to May 14, if anything was said by anybody in Detroit? A. No, sir.

Q. Do you know what Mr. Zell refers to when he says that "You said you would be glad to supplement our verbal agreement with a letter"? A. I assume he understood I was to give him a letter.

Q. "You were to supplement our verbal agreement." What does that refer to? A. I don't know what he meant. I had no agreement with him at that time.

[1171] Q. You know what he referred to when he said "We have many plans in the making to augment our organization in order to strengthen Packard's position in Baltimore"? A. I think he was referring to increasing the strength of his retail sales organization.

Q. He hadn't done it yet up until that time? A. He had done part of it. I don't believe all of it was done.

Q. I now want to show you Exhibit 42 dated June 10th, and that's Plaintiff's Exhibit 42, and ask you if you recall having seen that and endorsed your handwriting on it? A. Yes, sir.

Q. Do you remember that? A. Yes, sir.

Q. Now I am showing you Exhibit 40. Do you remember having discussed the contents of that letter at your conference here in Washington? A. No, sir, I don't.

Q. With Mr. Zell? A. I don't remember that we did, no, sir.

Q. Pretty important letter, wasn't it, to you? A. Yes, sir. Yes, I think it is an important letter.

Q. Was Mr. Armstrong one of the men in Detroit to whom you assigned instructions to take over this local situation in Baltimore? [1172] A. To take over the Baltimore situation, yes, sir.

Q. Is Mr. Armstrong a lawyer? A. No, sir.

Q. Was he doing it under legal instructions and advice? A. From a certain date on he was, yes, sir.

Q. What was that date? A. I am not sure. I think it was around the 1st of April, but I am not sure about that.

Q. "I informed Mr. Zell by telephone today and——"

I am reading from Plaintiff's Exhibit No. 41.

> "That Webster Motor had been given until the close of business tomorrow, June 11, 1952, to return to the zone office an amendment to its Packard dealer sales agreement."

Was it a practice under your instruction from Mr. Armstrong to keep Mr. Zell advised of everything which was taking place in the local situation so far as your company was concerned? A. May I ask the date of that again?

Q. This is June 10th, 1952. A. Yes. That would be under our instructions and on advice of counsel.

Q. Did you tell Mr. Webster anything that had been going on at all? A. I didn't.

[1173] Q. Did you instruct anybody to? A. I don't recall we did.

Q. Did you instruct Mr. Beck at any time not to tell Mr. Webster anything? A. No, not that I recall.

Q. And you gave him no instructions to tell Mr. Webster anything? A. I didn't, Mr. Leahy. I couldn't be sure whether those instructions might have come from Mr. Abernethy or not. I didn't personally.

> Q. "Mr. Zell was entirely satisfied and understands that it is not policy for us to give him a letter requested in his letter of May 14th."

That's the letter which I just showed you. Why didn't you give him the letter? A. We thought there was no need for it. There was no reason for it.

Q. That was in your judgment? A. In our judgment.

* * *

> [1174] Q. "It was noted that the DeBaugh dealership at Towson still has its sign up although its contract is terminated, and is buying cars through Sidney Zell."

Did you authorize the purchase by DeBaugh of cars through Sidney Zell? A. No, sir.

Q. Did you instruct anyone else to do so? A. No, sir.

Q. Did you know that Mr. Beck had called at Detroit about it? A. It is quite possible he did. I didn't know it.

Q. You haven't heard that before? A. No.

Q. You didn't know anything about the fact? A. I knew that DeBaugh was buying cars from Zell, yes.

Q. Oh, you did? A. Yes.

Q. When did you learn that? A. From that memorandum.

Q. So before you read this you didn't know the facts? A. I couldn't recall that there was any statement on it.

* * *

[1175] *Redirect Examination by Mr. Denit:*

Q. Mr. Briggs, I ask you to look at Plaintiff's Exhibit 37 and particularly the handwriting which is endorsed on the upper right-hand side. A. You asked me to identify the signature?

Q. Look at the handwriting. A. Yes, sir.

Q. Now is there a memorandum "Discussed with C. E. B."? A. Yes, sir.

Q. Having looked at that memorandum, are you now able to tell us whether or not you did advise somebody concerning the visit to Deal Island? A. I will have to say in all sincerity I did not know that I recall any instructions coming from Detroit to the Washington zone office regarding the trip to Deal Island.

Q. The entire memorandum reads:

> "4-1-52. Advised Beck by telegram to try and get cancellation 7-1-52 amendment signed by Webster."

Then there are two lines, and underneath that:

> "Discussed with C. E. B."

They are your initials, aren't they? A. Yes.

Q. And that would be you that he referred to? A. That's right.

[1176] Q. Can you identify the other initials there as the initials of Mr. Abernethy? A. I believe they are Mr. Abernethy's, yes.

Q. So that you were confused when you told us that the matter of extending to 7-1-52 was not discussed with you? A. I must have been.

Q. Since your connection with the Chrysler Motor Company, have your duties been arduous? A. I would say very arduous.

Q. Time consuming? A. Very much so.

Q. Did they afford you an opportunity to review all of this entire file concerning Webster and Zell? A. No, sir.

Q. And you came here to Washington to testify yesterday, did you not? A. Yes, sir.

* * *

[1178] ROY ABERNETHY was called as a witness by the defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Denit:

Q. Will you state your full name, please, sir? A. Roy B. Abernethy.

The Court: What is your first name?

The Witness: Roy.

By Mr. Denit:

Q. Where do you live? A. Toledo, Ohio.

Q. In what business are you engaged? A. I am vice president of sales of Nash Division of [1179] American Motors.

Q. How long have you been connected with the automotive industry? A. Twenty-eight years.

Q. Will you indicate briefly your experience? A. I was with the Packard distributor in Pittsburgh, Pennsylvania for 18 years, holding every position from mechanic

on up to the manager of that distributorship. That was up until 1943. I joined the Packard Motor Car Company at Detroit at that time as regional manager in Kansas City. Then I held various positions as zone manager, and later general manager in New York in 1946. In 1949 I was a dealer of my own, and later I returned to the factory at their request, and was general manager of Packard New York. And then I was promoted to assistant general sales manager in Detroit.

Q. As general manager of the New York operation, did you have charge of the sale of automobile and parts at retail and wholesale? A. Yes, sir.

Q. When you became assistant general sales manager in 1951, what were your duties? A. I was assistant to Mr. Briggs in charge of the [1180] field force from California to New York.

Q. And you occupied that position for approximately two years, is that correct? A. Approximately two years, a little less than two years.

Q. Then where did you go? A. I joined the Kaiser Motors Corporation, and later Willys Motors, Inc., as they merged as vice president in charge of sales.

Q. Do you hold that position at this time? A. No. About a year and a half later I was asked to join the American Motors, and became vice president of sales of Nash Division of American Motors.

Q. And that is the position you hold at this time? A. Right.

Q. Mr. Abernethy, do you recall arranging for a conference with Mr. Zell in New York in 1952? A. Yes, sir.

Q. And through whom did you do that? A. Through Mr. Beck, the zone manager, in Washington, D. C.

Q. Was the conference held on January 29, 1952? A. I believe that's the date, at the Waldorf in New York City.

Q. It has been testified here that Mr. Clare Briggs, [1181] yourself, Mr. Fenn, Mr. Marshall G. Beck, and Mr. LeRoy Spencer were present at the conference. A. That's correct. Mr. Spencer was only present part of the time.

Q. Was this conference arranged in connection with your attendance upon some other business of the corporation? A. Yes. We, like other manufacturers, attended the N. A. D. A. conference there, which was our main reason for being in New York, and at the same time held dealer conferences that were arranged during the period that we were there, one of which was with Mr. Zell.

Q. Will you tell us, please, sir, what your recollection is of the discussion at that conference? A. Well, as I recall, Mr. Zell told us the information about his problem in Baltimore or losing money, and stated that unless he could get into a position where he would be the dealer in Baltimore, that he would have to resign as a dealer. We told him—rather Mr. Briggs did—that we would take it under consideration, and let them know.

Q. At that time was there any request on the part of Mr. Zell that he be made sole dealer for any indefinite period of time? A. No, sir.

Q. Was the time when he desired to become dealer fixed?

[1182] Mr. Leahy: I presume we could get this, if Your Honor please, without these direct leading questions.

The Court: Yes, this being direct examination, I don't think you should lead the witness.

By Mr. Denit:

Q. Well, after the conference, was the matter that was discussed taken under consideration? A. Yes, sir.

Q. Did you have any talks with Mr. Briggs about the request? A. Yes. Following our return to Detroit, and during the next, as I recall, two, three, four weeks, we had several conferences regarding the Baltimore situation.

* * *

[1185] Q. Mr. Abernethy, yesterday at the time of the adjournment we had discussed the New York conference and the request made by Mr. Zell to you and Mr. Briggs and the other gentlemen. Thereafter was Zell's request taken under consideration? A. Yes, sir.

Q. Did you discuss it with Mr. Briggs? A. I discussed it with Mr. Briggs on more than one occasion.

Q. Did you discuss it with Mr. Armstrong? A. Yes, sir.

Q. Did the three of you discuss it together? A. Yes, sir.

Q. What factors did you take into consideration and [1186] communicate to Mr. Briggs with respect to what decision should be made upon Zell's request? A. Well, we reviewed the file—I reviewed the file because I was away from the company a year or a year and a half preceding that—and it was up to us to make a choice of which dealer we wanted to continue with in Baltimore. So we took into consideration the absentee ownership. We took into consideration the volume of business that one dealer was doing because after all they were all our customers. One was doing about four to one. The other had larger facilities. They had been there a good many years and was one of our largest volume dealers, so in taking all of that into consideration we decided that rather than lose Mr. Zell that we should consider making him the sole dealer in Baltimore.

Q. You referred to four to one. What did you mean by that? A. Well, where Mr. Webster would deliver 100 a year, Mr. Zell would be delivering 350 or 400 a year.

Q. That means new cars? A. New cars.

Q. Did you take into consideration whether or not the public interest would be served best by making Mr. Zell the sole dealer? A. Yes, because we had enough confidence in Mr. Zell's ability to merchandise in volume that he would, after he agreed to augment his force and agreed to reach farther for [1187] trade allowances. We call it reaching. We felt definitely that he would give us volume and give good prices to the customers there, and then of course we were very much concerned about the service for our Packard owners in that area. He had facilities that would definitely surpass Mr. Webster's, and be able to service more of the Packard owners operating in that area. And after all, that was our main outlook. Those owners, we consider them as our owners. The territory was ours, and we had to look out for our interests in this trial period that we were considering for the Baltimore area.

Q. Were all those factors discussed between you three gentlemen, Mr. Armstrong, Mr. Briggs and yourself? A. Yes, as I recall, they were. They would be definitely a part of any decision we might make in fairness to all concerned.

* * *

Q. What records did you review at the home office? A. Well, as I recall, we reviewed financial statements. [1188] We reviewed the penetration of the market, which is after all a guide for us. We would review the dealer's ability to handle trade. After all, many dealers, when they reach up to a certain volume, their used car inventory gets

to a certain point, they have to stop trading until they liquidate that. Therefore, we reviewed the statement. We reviewed his trend, his travel rate so to speak, on a yearly basis.

Q. What is "travel rate"? A. Travel rate is a dealer's ability to sell 25 or 30 cars a month, and whether he can maintain that travel rate. If he is selling 25 a month, it might indicate to us that he was a 300 car dealer, where another one might be selling eight or ten a month, and he would be a 100 or 120 car dealer. So we refer to it in our business as travel rate. Is he traveling 100 a year, 200 a year, 300 a year, or 400 a year.

Q. Were these disclosed in a report that dealers made to Packard? A. They would be a part of the record.

Q. And those reports were made pursuant to the contract requirement? A. That's right.

Q. Why did you feel it was necessary to choose between Zell and Webster? A. Well, the reason it was necessary is that we were faced during that period, we were faced with losing some [1189] dealers and trying to get dealers. On the other hand, Baltimore was an important market for us. Mr. Zell had indicated that as I testified yesterday they were considering not going along with his lease. He was considering not going along with our contract at all. Therefore, we felt we were going to end up with one dealer. And therefore, if we wanted that one dealer, we had to choose the best dealer for the interests of Packard Motor Car Company.

Q. Why did you feel you were going to end up with one dealer? A. Because he said he would resign. He was going to give up his franchise.

Q. And that would leave you whom? A. That would leave Mr. Webster.

The Court: How about DeBaugh?

The Witness: DeBaugh was not a factor, in our opinion. He was a small dealer on the edge of town.

By Mr. Denit:

Q. What had his volume been as compared to Zell? A. Are you referring to DeBaugh?

Q. Yes, sir. A. As I recall, it would be 12 to 24 cars a year.

The Court: Then how about Schulte?

The Witness: Schulte wasn't a factor at that time, [1190] as I recall, sir.

By Mr. Denit:

Q. Hadn't Schulte or he indicated that he was quitting? A. I believe that Mr. Schulte resigned before I was at central office. He resigned of his own accord, as I recall reading the records some place along the line, prior to my taking the job as assistant general sales manager, which made me responsible for that particular area.

Q. Did you have anything to do with his resignation? A. I did not.

Q. Did Packard have any, or rather, did you have any knowledge as to whether or not you would be able to replace Zell by a dealer of similar size and capacity? A. During that period we were finding it very difficult to find men who could invest that type of money in dealerships. As a result, in some areas we were forced to open up retail branches company-owned. I believe Philadelphia was opened on or about that time for the same reason, that we couldn't find a man with a half a million dollars to take over our dealership on Broad Street in Philadelphia.

[1191] Q. Did you know of any locations of dealers in Baltimore comparable to Zell that might have been used to replace Zell? A. Not that I know of, sir.

Q. Now, then, as I understand it, you communicated to Mr. Beck the decision of your company to comply with Mr. Zell's request; is that correct? A. Right.

Q. What did you tell him to do?

* * *

[1192] The Witness: I called Mr. Beck and told him we had reviewed the situation in the central office and had decided to make Mr. Zell the sole dealer in Baltimore and he should so advise Mr. Webster that his contract would expire.

By Mr. Denit:

Q. Thereafter did you receive a report from Mr. Beck as to what had been done in that connection? A. Yes. He telephoned me, and I believe wrote—included it in what we call his weekly report—but he telephoned me that he had had a very nice visit with Mr. Webster at Salisbury and had arrived at a point where Mr. Webster would liquidate his business.

Q. Thereafter did he report to you in writing concerning that? A. I believe so.

* * *

[1195] Q. Mr. Abernethy, after notifying Mr. Beck that Packard had decided to comply with Mr. Zell's request, did you have any further discussion with Mr. Beck concerning the accomplishment of that purpose? A. Yes, the detail of which is rather difficult to remember, but I do recall that we had several conversations over the telephone pertaining to the accomplishment of it. Then the next thing that I

knew about was the receipt of a letter that Mr. Beck wrote to Mr. Webster dating it July 1st, which was exceeding his authority to do so. And then I did call him up and reprimand him for his move in that respect.

Q. Then what was done? A. He thought that—I recall Mr. Beck's conversation, he felt—or the intent of it was to cooperate during the liquidation period. [1196] I referred the thing to Mr. Armstrong, and we of course felt that we might be extending Mr. Webster's contract. And the matter was taken up with counsel, and a three-month contract was offered—it was suggested that Mr. Beck offer a three-month contract because he felt that Mr. Webster would sign such a contract, as I recall the conversation, due to their previous conversation at Salisbury, and so he was instructed to present a three-month, or a July 1st termination of the contract for the new contract.

[1197] Q. Did he thereafter report to you that he had done so? A. Yes, because we kept in close touch, both Mr. Armstrong and myself, with Mr. Beck from that time on. And after all, he was responsible for running it, but since he had in our opinion made the error of offering the July 1st letter to him, which we felt was made on good faith on his part, we advised him through counsel what to do at that time.

Q. And the three months' contract was rejected, was it not? A. The three months' contract was rejected, and as I recall—well, at that time we definitely told him that we would renew for a year. Mr. Beck didn't think that was necessary, and one conversation led to another, to the point where Mr. Armstrong and I came down ourselves to see Donald Webster in Mr. Leahy's office.

Q. Before you get to that, when did you tell Mr. Beck that he was authorized to renew for a year if the three

months' extension or renewal was not accepted? A. It was after Mr. Webster refused to sign the three-month franchise.

Q. Now, you and Mr. Armstrong came to Washington, you say? A. Yes, sir.

Q. Do you recall approximately when? [1198] A. As I recall, since the contract expired March 31st, it was sometime in early June. After all, I was covering the United States, and I had a lot of problems across the country, and we arranged a trip, I believe it was early in June.

Q. Does May 20th refresh your recollection as to the date? A. May 20th?

Q. Yes. A. It could have been. It may have been late May.

Q. Was it after the receipt of a letter from Mr. Leahy? A. I recall Mr. Leahy's letter that was sent to Mr. Beck, I believe, and forwarded into us.

Q. You said there was a meeting attended by Mr. Donald Webster and Mr. Leahy? A. Yes.

Q. You and Mr. Armstrong? A. That's right, and there was another gentleman there. I do not remember his name, but he was in there at least part of the time. Donald Webster, Mr. Leahy, Mr. Armstrong and myself and another gentleman. I have forgotten his name.

Q. Could you identify the gentleman as Mr. Hughes, sitting here at the counsel table? A. Yes, he looks familiar to me. That's right.

Q. Now, will you tell us, please, sir, what took place [1199] at this conference? A. We went in of course, and Donald, as I recall, challenged us as to whether we were attorneys or not.

Q. What did he say? A. I can't recall. I can just remember the highlights of the meeting, but that they wanted

to deal with our counsel. We told them we were there in a commercial way, to talk to them about renewing the franchise. And Donald of course covered the background back to the time—he went in to a lot of explanation of the problems, and even back when Mr. Zell was a distributor, which of course was not of interest at that time. We had decided to renew the franchise, and after some discussion both Mr. Armstrong and I were there, we took part in it. And in Mr. Leahy's presence I offered Donald Webster the renewal, and he said that he would have to take it up with the board of directors and let us know.

Q. What did you say to him in offering the renewal? Tell us as nearly as you can recall what you said. A. I can't recall the exact words except I remember the point because I think we both got a little steamed up at the time and I told Donald Webster that we would renew the franchise for a year. He seemed to feel that we might try to do something to break that franchise during the year, and that he would have no assurance of having it renewed at the end of that year [1200] the next March 31st. It was at that time that I told him I would give him my personal assurance, and I was assistant general sales manager, that the dealership would be treated the same as any other dealership when we take a look as to whether we are going to let them expire or not at the end of the contract year.

Q. Do you know whether or not Mr. Donald Webster held an office with the Webster Motor Car Company at that time? A. I just can't answer that.

Q. Did he tell you whether he was vice president or not? A. It seems to me there was a discussion, but I can't remember it clearly.

Q. Do you recall any discussion as to your capacity and authority to sign a contract and his authority to sign

a contract? A. I assured him of my capacity to present such a contract to him and to do that, and I think that Donald's dad knows as well as any other Packard dealer in the United States when I gave them my personal assurance, that my integrity was sufficient that I meant exactly what I said, and that I was there for that purpose.

Q. Did you have in mind at that time of trying to find some reason or excuse for cancelling the contract after it had been renewed? [1201] A. No, our zone manager, in error in our opinion, extended the contract to July 1st, and we decided then to go ahead with the renewal of the franchise. The only reason the three-month franchise was submitted is simply because Mr. Beck felt that he was on such terms with Mr. Richard Webster that he would sign such a three-month deal. That was what he told me. As a matter of fact, we had quite a discussion on it. Mr. Leahy even suggested that I go to talk to Richard Webster myself in his office.

Q. Did you ever hear from Mr. Donald Webster as to whether the board of directors of the Webster Motor Car Company met? A. To my knowledge we never heard from Donald Webster.

Q. During this conference, may I ask you, was there any discussion of the antitrust laws? A. Yes. I think Donald Webster threatened—maybe I am using the wrong word "threatened," but stated that he felt we were encroaching on antitrust legal end of it.

Q. Was much time devoted to that discussion? A. Donald took up considerable time in discussion. I can't remember. As I recall, we were there for a couple of hours, maybe two hours and a half. And I can't remember all the details pertaining to that, and wasn't thinking in legal terms anyway. I was there to renew a contract.

[1202] Q. Now, after that discussion did you again authorize Mr. Beck to offer a renewal contract for a one-year term? A. Yes, sir.

Q. With what result? A. We—as I recall it, he reported back that he had presented a franchise, I think, at Baltimore, to Mr. French, but it was never signed or returned to us.

Q. Do you know, Mr. Abernethy, that the Webster Motor Car Company continued to purchase automobiles and parts as a dealer at dealer prices through June of 1952?

* * *

The Witness: Yes, I believe that's correct.

* * *

[1203] Q. Had Mr. Beck been authorized to offer a one-year renewal contract prior to your conference at Mr. Leahy's office? A. As I recall he had authority to do it, yes.

[1204] Q. Do you know whether or not he did? A. Well, the reason I recall he did was because when I called him back and told him that we decided to offer the year renewal, he felt that Mr. Richard Webster, as I previously testified, would go along with the three-month franchise. For that reason he took a three-month franchise and offered it to him first on the deal, and we finally told him to go ahead with our original instructions of renewing for a year.

Q. At the conference in Mr. Leahy's office, was that fact referred to in the discussion? A. Yes. There were a good many things discussed that day. I just remember the highlights of our conversation pertaining to the fact that we wanted to—that we were offering a renewal of the contract.

Q. When the offer of the renewal contract was made by you in Mr. Leahy's office, did you have in mind any purpose in trying to find some excuse for cancellation during the year, or any purpose not to consider renewal on March 31, 1953? A. Not at that time because it was our policy generally to leave a contract expire rather than cancel for cause. In looking down the road, to answer the second part of your question, as to what might happen on March 31st, or the following year, I certainly wouldn't have anything in mind for that dealership or any other dealership, because we would have to wait and see what the situation was at that time.

[1205] Q. Did you intend it to be a bona fide extension of his contract for an additional year? A. Positively.

Q. Now, Mr. Abernethy, you have been with three or four different automobile concerns, have you not? A. I was with Packard from 28 to 30 years, and I was vice president of Willys Motors, Inc., and I am present vice president of Nash division of American Motors.

Q. And you had been a dealer on your own? A. I was a dealer for approximately 16 months during some of the period that this was happening.

Q. Do you know what is called a "seller's market" in the automobile industry? A. I sure do.

Q. Do you know what is called a "buyer's market"? A. I sure do.

Q. What is the difference between the two? A. Well, the seller's market is when the demand for cars by customers is really greater than the supply, and therefore the dealer is able to get the full gross profit or the full price of his car at all times. On a buyer's market, the customer sets the pace. In other words, the supply is greater than the demand, and therefore the customer attempts to get the best deal possible for the used car he is trading in,

or for a discount from the [1206] new car he is buying in case he is not trading a car.

Q. What was the period from 1946 through 1949, a buyer's or a seller's market? A. From 1946 through '48 and into late '49 it was, in my opinion—'46 through '48 was a real seller's market. '49 was a combination of buyer's and seller's market.

[1207] Q. Were used cars plentiful or otherwise from '46 through '48? A. There was a shortage of used cars through '46—from '46 through '48, primarily as new cars—the fact we had been in a war prior to that time.

Q. Would you say that '46 to '48, '46 through '48, represented a normal period in the automobile industry? A. It was an abnormal period.

Q. In what way? A. Because it was a buyer's market where the supply was not great enough to take care of the demand that had been built up during the period because cars weren't being introduced. There has never been a period like it.

Q. I thought you said a moment ago it was a buyer's market. A. I made the wrong statement, I am sorry. It was a seller's market. It was a seller's market.

Q. And could not be considered as representative of the automobile industry generally? A. That is true.

Q. And did not represent an average period? A. By no means.

Q. Now, in view of your experience in the automobile business, can you tell us whether over-allowances on automobiles necessarily result in low profit and low net profit to [1208] the dealer? A. No. It depends to the extent of over-allowances. It naturally reduces the gross profit. Are you talking about the net profit per car or the net profit per the operation?

Q. Per the operation. A. No. Over-allowance is not the contributing factor in that connection.

Q. What are the factors? A. Well, the factors for a net profit in a dealership can consist of high overhead—let me restate the statement, please. The result of a low net profit can result from high overhead, and trading allowances that are beyond what the dealer should give in order to retain the percentage of gross profits to help pay that fixed expense; or it could mean that the penetration of the market—all three of those. In other words, the amount of volume that any one dealer can get out of a given market in respect to the price of the cars he is selling.

Q. What is the factory's interest in volume? A. The factory is always interested in volume. In other words, when factories make investments of several million dollars for new tools, the only way that they can maintain price and make a profit for themselves is [1209] to get greater volume so they run more units across those same given groups of tools. And the only way they can get greater volume is to get the greatest penetration in every given market in the United States.

Q. Would it be fair to say that the factory is primarily concerned with those dealers who can get the greatest volume?

* * *

A. Positively.

Q. What effect on the allowances that a dealer is able to make does his volume have in new cars?

Mr. Leahy: Might we approach the bench, if Your Honor please, for just a moment?

The Court: Yes, indeed.

(At the bench:)

Mr. Leahy: I haven't objected because I don't want to keep interrupting, but I can't see where the materiality of this evidence, or its relevancy, is important at [1210] this time, but I don't want to keep objecting.

The Court: Well, I assume that the evidence is introduced for the purpose of showing that it was important for Packard to retain Zell as a big dealer. Isn't that it?

Mr. Denit: That is right.

The Court: I do think, however, that you are laboring the matter somewhat, because it is perfectly obvious that any manufacturer wants to sell as many units as it can, whether it be automobiles or radios. In other words, I think you are trying to prove the obvious.

Mr. Denit: No. This affects the public injury as well, Your Honor.

Mr. Leahy: How?

The Court: No. I don't think you got my point, Mr. Denit. You are trying to ask a series of questions as to why Packard, or any manufacturer, wants volume. I think that is just obvious. It is just trying to prove the multiplication table.

Mr. Shapiro: Your Honor, there is another purpose as well, and that is getting volume in a buyer's market necessitates trading which would be a benefit to the public.

The Court: Well, you can go into that, but you don't have to consume time to prove that volume is desirable. Naturally volume is desirable. It is the obvious. [1211] But I think the line of testimony is relevant as bearing upon the question of conspiracy.

I do want to say this, that my view of the antitrust law is that motive is not an element.

Mr. Leahy: That is right.

The Court: In other words, a violation of the antitrust laws can be committed in perfect good faith and with a motive that is perfectly legal, and even honorable. In other words, let's assume this to be the fact, and I will take a supposititious case: Suppose these people in good faith said, Well, now we have got to make a choice, and it is to our best business interest, if we have to make a choice, to choose Dealer A rather than Dealer B, because Dealer A will sell more of our cars, and Dealer A says he won't continue unless we eliminate Dealer B. Now, from a businessman's standpoint that might be perfectly reasonable, but if that transaction is a violation of the antitrust laws, the fact that it was done with the proper motive won't save it from being a violation.

Mr. Shapiro: If Your Honor please, the motive need not be a motive to have a criminal motive or intention to violate the antitrust laws, but there must at least be a motive to restrain trade in the sense of anticipating what you are going to do.

The Court: Not on motive. There must be an intent [1212] to restrain trade, but intent may be inferred from the act. Of course if you say, Well, now, we will eliminate A, B and C and give all the business to D, you might be violating the second section of the antitrust Act. Now, you may be doing it for a very good motive, and you may not know of the Sherman Act—you may never have read it—and you may think that is a perfectly natural business transaction, but if the law pro-

hibits it, why, it is a violation. In other words, a man's criminal intent is not required for a violation of the antitrust laws, because it is not an offense involving moral turpitude.

Mr. Shapiro: That is true, Your Honor, but if your purpose is to do an act which you anticipate will confer a public benefit, as distinguished from harm to the public, you cannot violate the antitrust laws.

Mr. Leahy: Oh, yes.

The Court: Oh, yes, you can.

Mr. Leahy: Oh, you can restrain competition in a minute by doing that.

The Court: Oh, yes, you can. In other words, your purpose may have been to be a benefactor of mankind, but if the accomplishing of that purpose is forbidden by law, your good purpose does not take the curse off the act that you have taken. [1213] We are not dealing with felonies, you know, where criminal intent is an indispensable element of the offense.

Mr. Smith: Your Honor, under the Sherman Act it is necessary for the plaintiff to show that the public was injured. What we propose to prove is the object which Packard sought not only was beneficial to Packard but also was beneficial to the public, and accordingly there was no injury to the public, but on the contrary benefit to the public.

The Court: I am going to allow this line of testimony. I am just pointing out the various ramifications because I think it is relevant on one theory, but I wanted to be sure that you were not putting it in on another theory which I think would not justify it.

Mr. Smith: I think we understand all the available theories, Your Honor.

Mr. Leahy: A benevolent monopoly is just as bad as long as it is a monopoly.

The Court: As long as it is forbidden by law. It may not be as bad.

Mr. Leahy: And you can't confer a public benefit by restraining competition because the law forbids that.

The Court: Of course, economists differ, but we have to go by the law.

[1214] Mr. Smith: We expect to show there was no restraint of competition.

Mr. Leahy: You go ahead.

The Court: I do suggest, Mr. Denit, you don't consume any time proving the obvious. That is all I meant.

(In open court:)

Mr. Denit: I don't think the witness has answered the question that was objected to.

The Court: Suppose you repeat your question. The reporter would have to go away back in her notes, and it would take a little time.

* * *

[1215] *By Mr. Denit*:

Q. We were discussing the desire of the manufacturer to obtain the largest sales, the largest volume of sales, and therefore the selection of a dealer who could accomplish that. A. Right.

Q. Was the decision to comply with the Zell request based on the theory that Zell would be able to acquire the

largest volume of sales? A. Yes. Mr. Zell had indicated to us that he would augment his selling force, and that he would be willing to reach further on deals. That he would definitely carry a greater inventory of cars, and he wanted that opportunity to do so for a trial period to see if he couldn't give us the penetration. By "penetration" I mean get us a greater per cent of business than we were then getting out of Baltimore.

Q. Do you know whether or not in the period from March, 1952, to March, 1953, the Zell organization did get a greater volume? A. Yes, they did. They got a greater penetration of the market than they were getting before the decision was made.

Q. Mr. Abernethy, is it unusual for a manufacturer to have only one dealer in a city? A. It is not unusual.

[1216] Q. In your experience with these other companies, Willys and the American, which is a combination of Hudson and Nash, is it not? A. Right.

Q. Do you know whether or not there are cities which have only one dealer for those automobiles? A. There are quite a number of cities and cities similar to the size of Baltimore; where a dealer has the necessary capital and ability to get the business, so long as he gets the penetration of the market, the factory usually goes along with him.

* * *

[1217] Q. In order to get the volume in a buyer's market, what must a dealer do? A. In order to get volume in a buyer's market, a dealer, of course, has to have ample capital to handle high inventories of used cars, and he must get the turn over on used cars, but definitely if he has $600 gross profit in the car he is selling he has to reach for various types of deals. In other words, he may have to take a $250 or $200 variable net profit in order to get the volume out of a given market.

Q. What do you mean by "variable net profit"? A. Variable net profit is a term we use in our business that is the—To give an example, let's take the $600 gross profit. If there is a $150 selling commission let's deduct it from that, which leaves $450. Then the dealer can decide how far he wants to reach over and above the value of a used car, of that $450. He can give the whole $450 away and make nothing, or he can $350 and wind up with $100 variable net profit. It is up to the dealer. If he wants to give away a certain part of that gross profit, thereby lowering his variable net profit, that is up to him.

Q. In the automobile industry what is the really vital competition? [1218] A. It is your competition in the cars you are selling with regard to the price car.

Q. Is that the important element of competition that is involved as compared to competition between dealers? A. Yes. I would say that the cars themselves are the important competition. There is pre-selling which we do through the factory, selling our product to the customers, and then there is the creative selling which our dealers are supposed to do at dealer level, and therefore that sells the product, and the product is the important thing. Everything follows the product in this business.

Q. And that is Hudson versus Oldsmobile, or Oldsmobile versus some other make? A. That is right. The competitive cars are Olds and Buick, and there are quite a number of them, as you know.

Q. Were you familiar with the dealer profits in the years '49 to, say, '53? A. Yes, to a certain degree. I of course don't remember all those, after being through three companies. I don't remember all the exact figures, but I do

know there were some poor periods and I know there were some good periods.

Q. Was there any trend in those profits during that period? [1219] A. As competition became greater, profits went down.

Q. Was that true with respect to the period from '46 to '49? A. That was true. Profits were extremely high through that period.

Q. Was there any trend indicated in 1954? A. '54 for a good many of the manufacturers was a losing year, a definitely losing year.

* * *

Q. Was that true with respect to dealers? A. Yes.

* * *

[1220] Q. I show you a photostat of a letter dated February 26, 1954, directed to you, and ask you if you can identify the signature on that? A. Yes, sir.

Mr. Denit: We offer it in evidence, if the Court please. A copy has been furnished to opposing counsel.

The Court: It may be admitted.

The Deputy Clerk: Defendants' Exhibit No. 22.

* * *

[1222] *By Mr. Denit*:

Q. Mr. Abernethy, did you ever meet Senator Phoebus? A. I have not.

Q. Did you ever know Senator Carter? A. I did not.

Q. Did you ever know Senator Mason Sheehan? A. No, sir.

* * *

[1223] *Cross-Examination (Resumed) by Mr. Leahy:*

* * *

Q. You have known Mr. Webster a long time? A. A very long time.

Q. How long, would you say? A. Well, I would like to answer it this way: I think Mr. Webster—I have known Mr. Webster by reputation, as well as he has known me by reputation, and actually have only met a few times at sales conventions over a period of years.

Q. That's a long period, too, isn't it? A. Yes. I started——

Q. Back when you were young men together, wasn't it? A. No. I started out as a mechanic at 18 years of age. At that time I think Mr. Webster was well along as a good salesman before that. I met him later as I went into the selling end of the business.

Q. Well, you knew him for approximately 25 years anyway, didn't you? A. I knew of him for approximately 25 years, because [1224] he was a top master salesman for Packard.

Q. And when was it you came with Packard? A. I came with Packard in June of 1952 as a mechanic.

Q. When did you finally arrive in an official capacity with Packard? A. When I came with Packard—I want to qualify that, Mr. Leahy. I came with Packard, with the Packard distributor the same as Mr. Webster did, and I held several capacities, every capacity up through the line, from mechanic. So it depends upon what you call "official capacity". I was a service salesman, a retail salesman, a wholesale manager, on up the line. And I would assume that in the early '30's I entered into official capacity.

Q. With Packard Motor Company at Detroit? A. No.

Q. When did you go with the head office? A. I went with the head office in 1943.

Q. And in what capacity did you go with it? A. As regional manager in charge of the Kansas City area.

Q. And then what other offices did you hold from that period on? A. I will take you through the steps. I was in Kansas City for 18 months doing a certain job for Packard. Then I went back to Pittsburgh as zone manager. There [1225] was a distributor there the same as Mr. Zell. Packard took over that distributorship, and I was sent back as a young follow to be the boss over my former boss, the distributor in Pittsburgh, who then became a dealer as Mr. Zell. I was there for 18 months reconstructing the territory and building a dealer organization. I was promoted to the vice president of New York Packard Motor Car Company in New York, and regional manager for that area, operating about a $30,000,000 business in New York City. Later on the Washington and Buffalo area was added to my region. In 19——

Q. In what year was it that Washington was added? A. I can't tell you the exact time. It seems to me about a year prior to resigning from our company.

Q. When was that? A. I resigned in October of '48 to take my own dealership in Hartford, Connecticut, known as the Abernethy Packard Company.

Q. Is that where you are now? A. No.

Q. All right. From '48 on then, you were not connected with the Packard office in Detroit? A. From the fall of '48 I was not. I was responsible [1226] in the Eastern Division up until that time. Then I resigned—was away for 18 months—and they asked me to come back. They were having merchandising——

Q. Who were they? A. The factory, Mr. Ferry, the president, and Mr. Leroy Spencer, executive vice president, who asked me to come back as general manager.

Q. At Detroit? A. No, at New York. They had problems in New York. I came back.

Q. When did you have your last office, I mean the office space, in which you functioned with, an office at Detroit? A. That was in June of '53. I resigned after spending about a year.

Q. Had you been in the Detroit office during the period of time when this discussion with Mr. Zell occurred? A. Yes, sir.

Q. You were there in Detroit then? A. Yes. I went to Detroit. I moved my family just a week before Christmas.

Q. You went to Detroit? A. And met Mr. Zell in January at Baltimore—at the Waldorf in New York.

Q. Who asked you to go to New York to talk to Mr. Zell? [1227] A. There wasn't anyone asked me to go there.

Q. How did you come to be in the room in New York at the hotel? A. We went there because of the N. A. D. A. convention, and a request was made by Mr. Zell to see Mr. Briggs.

Q. When did you first become acquainted with the fact that the request had been made to see Mr. Briggs by Mr. Zell? A. Just prior to the N. A. D. A. meeting, at which time Mr. Marshall Beck called and wanted to know about such an appointment.

Q. Who did he call, do you know? A. He talked to me, I believe. He talked to me.

Q. Why did he say that Zell wanted to see Mr. Briggs? A. He didn't say. He didn't know, I don't believe, at that time.

Q. Did you ask him? A. Not necessarily. I made several appointments.

Q. Did you, as you remember it, whether it is necessarily so or not? A. No, I said, as I recall, I probably would have asked him why.

Q. Well, did you? A. I can't recall exactly, sir.

Q. Wasn't that a rather unusual request for a dealer to see the man as high up as Briggs in the organization? [1228] A. No. We did that regularly.

* * *

[1229] Q. Mr. Abernethy, I think that we were discussing the arrangements being made for the New York conference just before the luncheon recess. Did you say you arranged for the New York conference? A. Yes, I did.

Q. Did you ask Mr. Armstrong to be there? A. Not that I recall.

Q. How did he come to be there, do you know? A. I don't believe Mr. Armstrong was there.

Q. Was Mr. Briggs there? A. Yes.

Q. Did you suggest he be there? A. A request was made for Mr. Briggs to be there.

Q. Who made it? A. Through Mr. Zell, through Mr. Beck.

Q. And Beck, did he personally ask Briggs to be there, or did you? A. No, I asked him to be there.

[1230] Q. You asked Briggs to be there? A. That's right. I set up other appointments for the same day.

Q. Did you ask him to be at this conference? A. Yes, sir.

Q. Did you ask Mr. Fenn? A. Yes, sir. He was divisional manager.

Q. Whom else did you ask to be there? A. Well, just Mr. Beck, Mr. Fenn, and Mr. Briggs. Mr. Spencer, of course, was there, and it was in the same suite, so he was there part of the time.

Q. And those were present at all the other conferences that you had that day? A. All but Mr. Spencer, I believe.

Q. Do you know now what it was that you expected to talk about with Mr. Zell? A. We did not exactly know what Mr. Zell had on his mind.

Q. You asked all these people to be at a conference about which they did not know what Mr. Zell was going to talk? A. Oh, no. When a key dealer asks for a conference with a vice president of sales, naturally, you have the zone manager, divisional manager, and the assistant general sales manager there for such a conference.

Q. What do you mean by "key dealer"? [1231] A. Well, a large volume dealer.

Q. Was he a large volume dealer? A. Yes, in our records.

* * *

[1232] Q. Did you look up at the conference what he was selling? A. Oh, sure. We have records with us showing the travel rate of each dealer. Naturally, we would look at them at the time.

Q. But you have no distinct recollection now as to what caused this group to come to the understanding with Zell that they would cancel the other or not renew the other agreements and make him sole dealer? A. No, Mr. Zell apparently had a problem on his mind, and he asked for an audience with the vice president in charge of sales.

Q. Did he tell you at the time when you were having that audience in New York as to how many he was selling? A. I don't believe it was discussed at the time. I'm not sure.

[1233] Q. Did you ever hear of Schulte? A. Yes.

Q. What were you doing for Packard when Schulte's case came up? A. I wasn't in this area when Schulte's case came up.

Q. When did it come up? A. I can't tell you exactly.

Q. Where were you in September 1951? A. September of 1951? I was general manager of the New York retail and wholesale store.

Q. When did you go to Detroit? A. In October. Moved the 1st of December.

Q. Of '51? A. No, I am sorry. Wait a minute. Yes, of '51, that is right.

[1234] Q. Then you were in Detroit January, '52? A. That's right.

Q. Did you know that Schulte had signed a mutual cancellation agreement in January, 1952? A. No, I didn't. It probably was a clean-up of a record of something that happened prior to my time.

Q. Did you know it? A. I may have seen the papers come through, yes. I can't say that exactly.

Q. Did you know at that time that Zell was then attempting to get Detroit to agree not to replace Schulte? A. I recall that there was some conversation along that line with the divisional manager.

Q. With whom? A. The divisional manager.

Q. Who was he? A. At that time we had transferred Platfoot from the east after I went to Detroit, and brought Fenn into the east, and moved Platfoot into the west.

Q. Didn't you see any of the record with regard to that decision made by Packard? A. And what decision was that, again?

Q. Not to replace Schulte? A. It's not clear in my mind, no.

Q. Did you know that Zell at that time was complaining [1235] that he couldn't get volume in Baltimore? A. In January of——

Q. '52? A. '52, yes.

Q. When you decided not to replace Schulte? A. I think Schulte was out before that, wasn't he, sir?

Q. No. He signed the agreement January 11, 1952.

Mr. Smith: That's a mistake, Mr. Leahy.

Mr. Leahy: That agreement was signed in January, 1952.

Mr. Smith: No, the agreement was signed——

Mr. Leahy: Give me the record, please, sir.

By Mr. Leahy:

Q. I am now showing you Plaintiffs' Exhibit No. 29 and 29-A. When does the termination of Schulte's sales agreement take effect, according to 29? A. It was dated December 14, 1951.

Q. When does it take effect, never mind when it is dated. A. January 11, 1952.

Q. Right there in front of you, isn't it? A. That's right.

Q. You have seen lots of those, haven't you? A. Oh, sure.

[1236] Q. Did you have any difficulty in answering that question at first when I asked you when it terminated by giving me the date?

Mr. Denit: I object to that. The question wasn't asked when it was terminated. The question was when it was signed.

Mr. Leahy: I think the question was asked when it was terminated.

The Court: I think this is proper cross-examination.

Mr. Denit: But, Your Honor, even in cross-examination we have a right to object and to state——

The Court: You have a right to object, and I will rule on your objection. Of course, you have a right to object, and I overrule your objection.

Mr. Denit: The question asked this witness was when was this paper signed.

Mr. Leahy: Will you go back, please——

The Court: I don't think you need to stop——

Mr. Leahy: I know I didn't so ask the question.

By Mr. Leahy:

Q. You agree with me now, do you, that it was terminated January 11, 1952? A. That's what the record shows, yes.

Q. You agree with me further that you were right there in Detroit, weren't you? [1237] A. I had been on the job about 45 days.

Q. And you knew about the Baltimore situation, didn't you? A. Yes.

Q. Always been a sort of a sore spot, hadn't it? A. Oh, I wouldn't call it "a sore spot," no. It was an important market for us.

Q. Hadn't you had a good many conferences since the time that you arrived in Detroit about the Baltimore situation, how you could cure it? A. We had some conferences, yes.

Q. Weren't you also talking about penetration of market in Baltimore? A. That's right.

Q. And volume in Baltimore? A. That's right.

Q. And what was the name that you had given Baltimore along with some other towns that didn't give you what you thought was your price class ratio? A. I think we had a list that was prepared by our market analysis department on towns that were called "Terrible towns."

Q. Terrible towns. And Baltimore was a terrible town, wasn't it?

* * *

[1238] Q. Baltimore was a terrible town, wasn't it? A. From a price class viewpoint at the time.

Q. And it had been for some time, hadn't it? A. I wouldn't know without looking at the records, sir.

* * *

Q. 16-A. Do you remember having seen that report about the terrible towns? A. Yes, I have seen it.

Q. Have you seen also Exhibit 16? A. I probably did at the time.

Q. Uh huh. Who leads the list there, loss dealers? A. Baltimore, Zell.

Q. So that I think you can tell us, can't you, that it was as a fact a town about which you officials in Detroit had a great deal of consideration, isn't that right? A. Along with many others that were a lower price class figure. We took them all into consideration which were below a certain price class objective.

[1239] Q. The question whether you should renew or refill the place left by Schulte came up just about the time

that you had that terrible town report from your field men? A. Those were published regularly by our market analysis department on every zone in the country.

[1240] Q. And did you engage in the decision that Schulte should not be replaced? A. I don't believe so. It is not fresh in my mind at all. I think the decision had already been made.

Q. Do you know by whom? A. I do not.

Q. Do you know that it was top officials? A. No, it seems to me that Mr. Schulte resigned, and they decided not to replace Schulte at the time, but I don't recall too much about it.

Q. You don't recall that Zell was the one who said, If you don't do that, I will quit the franchise for Packard? A. He never said that to me.

Q. Didn't you ever see it? A. I don't recall it, sir.

Q. You never heard of that before? A. I may have seen it, but I don't recall it.

Q. Let me see if I can refresh your recollection. The part about which I was just asking you is now an exhibit number. I will get that and give it for the record. I would like to have you look at that particular exhibit beginning with "Zell." Run down and see if that refreshes your recollection. A. (After reading page 5 of Exhibit 17):—I don't recall whether I read it at the time or not. I have seen it.

* * *

[1241] Q. But you didn't know then that Schulte in January [1242] was not being refilled, I mean, his place, because on September 24th Platfoot had agreed with Zell and Mr. Beck not to appoint another dealer for the present and therefore give Mr. Zell the opportunity to prove that he can do the job? A. It could have been a part of our discus-

sions at the time, but after all, the decision had already been made, and I wouldn't be interested in that particular decision.

Q. Do you know what the job was that Zell was promising you back there then? I mean by that, Packard? A. I had nothing to do with those conversations, sir.

[1243] Q. You don't know about that, then? A. It happened before I went to the factory and before I had anything to do with that area.

Q. Once again, you don't know anything about it, then? A. Only what has been reviewed here.

Q. Well, you did know it then, didn't you? A. Unless it came up in conversation from our divisional manager.

Q. Did you know what I just read to you in January, 1952? A. Well, that's hard to answer, sir, because it might have been covered—I don't know in entirety. I know we were having trouble getting our business out of Baltimore, but to give you a truthful answer, to say that I did know or that I didn't know, I could not say.

Q. Didn't you know Zell had said to Platfoot and Platfoot reported to you that Zell said, Webster and I can catch up with the business that Schulte did? A. No, I didn't know that.

Q. Did you know what cars Schulte was selling? A. No.

Q. Didn't you tell us this morning that Zell had caught up in volume in Baltimore since you made him a sole dealer? A. I said his penetration had risen since we had made him a sole dealer.

[1244] Q. Let's get what penetration means. Penetration of the market means selling cars in a market, doesn't it? A. It is selling our percentage share of that market, that is right.

Q. So when you talk about a man penetrating the market you mean he is able to go into the market and sell your car in competition with the rest. Isn't that what you mean? A. Penetration is getting our share of what we would like to get of a given market.

Q. You don't always get your share, or the share you would like, do you? A. No.

Q. You assign quotas to dealers, don't you? A. Yes, that is right.

Q. And those quotas are your hoped-for number of cars you will sell in that market? A. Yes, but they have nothing to do with determining penetration.

Q. That's right. Now, if a dealer sells his cars he is penetrating the market in competition with other cars, isn't he? A. That's right.

Q. Did Mr. Zell ever make his quota in his life? [1245] A. I am not certain whether he made his quota or not.

Q. Did he ever make it? Do you know? A. I don't know without looking up the records.

Q. Didn't you consider that something of importance, when he said to you that he wanted to be the sole dealer? A. No. We considered this, that we had the choice of having one dealer or the other. And all the facts pertaining to Mr. Zell indicated that he was the man we should tie to because we were going to end up with one dealer, one way or the other.

Q. Why did you have a choice to make? Why would you have to end up with one dealer one way or the other? A. Because Mr. Zell was going to step out.

Q. Couldn't you get another? A. I am not sure.

Q. Didn't you try? A. We didn't think we needed to because we could make a proper decision for our company.

Q. A decision for your company you could make.

A. We could make a decision to get the highest volume out of the market, the greatest volume out of that market.

Q. And you made the decision in accordance with the proposition Mr. Zell made to you in New York that if you didn't decide in his favor he would quit selling Packards? A. We made the decision based on what was good for [1246] Packard in getting our share of volume out of Baltimore.

Q. And in getting what you thought was the volume out of Baltimore you had to accede to Zell's request to make him the sole dealer or else, didn't you? A. That's what it amounted to.

Q. That's what it amounted to in plain language, wasn't it? A. Yes.

Q. And you decided you would give in to Zell's demands? A. No, it wasn't giving in to Zell's demands. Here was Mr. Webster who was an absentee owner, and we weren't getting the business out of him anyway, and it was only a natural that we would tie up with Zell.

Q. What do you mean by "absentee owner"? A. Neither he nor his son were active in the business.

Q. Didn't they have a president? A. Surely.

Q. Of Webster Motor? A. Beg pardon?

Q. Didn't they have a president of Webster Motor Company? A. I am sure undoubtedly they did.

Q. You know him, don't you, Mr. French? A. Yes.

[1247] Q. And you knew him a long time, didn't you? A. Well, I have known of him and known him, but Mr. French couldn't even sign an order for automobiles when you went there to project with him. He had to wait to go to Salisbury.

Q. Did you ever go into the office to sell automobiles to French and he said he couldn't sign for them? A. I never did personally.

Q. Did you ever go into the Webster Motor Car Company in your life? A. Yes, sir.

Q. When? A. I can't tell you the exact date.

Q. Well, try to remember. A. I was there and Mr. French was present; I believe I was there with Mr. Braden or Mr. Beck, I am not sure—Mr. Braden, I believe.

Q. When was Mr. Braden zone manager? A. I can't tell you offhand. He was zone manager when I first knew about Washington.

Q. To get back to this absentee owner business, where was Mr. Webster? A. As far as I know he was at Deal Island.

Q. Someone told you that? A. Yes, and I saw correspondence from time to time [1248] that indicated that he was there.

Q. From Deal Island? A. Yes. There were one or two occasions back over the years where he was in Deal Island.

Q. When did he go to Deal Island? Do you know? A. I can't tell you.

Q. Do you recall now whether you know of anybody who had tried to sell cars to French and French couldn't sign the order? A. Yes, I think it is a matter of——

Q. Well, do you know? Tell us where it is and where we can get it. A. I think it is on one of our field reports. Mr. Braden can tell you.

Q. Are you giving what you mean by the "absentee owner" the fact that Mr. Webster was conducting a business at Deal Island? Is that right? A. No. I meant that he wasn't active selling cars and managing the Packard dealership in Baltimore.

Q. Do you know that he wasn't active in managing? A. By reports from our field men.

Q. Can you tell what reports they were? A. Oh, many of them were verbal, of course.

Q. You kept in close touch with them, didn't you? A. Not necessarily.

[1249] Q. Well, did you? You kept in close touch, enough now so you can tell us this point, can't you? A. Oh, yes, any terrible town had our attention at all times.

Q. You also discussed this point with counsel yesterday, didn't you? A. No, I don't believe so.

Q. The absentee owner? A. No.

Q. Did you discuss anything about Mr. Zell having another business? A. No.

Q. Did you know he had one? A. I think he has a finance company, as far as I know.

* * *

Q. Let's return now to this New York conference. How long did that conference last? A. I would have to estimate, sir.

Q. Well, estimate. A. I would say an hour to an hour and a half.

[1250] Q. Well, now, that's quite a long conference, isn't it? A. Well, not necessarily.

Q. Wasn't that a long conference for all of you officials, top officials, of the factory in Detroit to be with a dealer—an hour and a half? A. Not necessarily.

Q. Did you have any other conference of an hour and a half and all you men tied up? A. Yes, sir.

Q. You went over the Baltimore situation very carefully, didn't you, at that conference? A. That is right.

Q. And it opened up, didn't it, by Zell telling you he had been losing money for a period of years and he didn't intend to lose money any longer, and that he was going to give up the franchise, and that he had a lease, and the lessor was pushing him for execution of a new lease, and he wasn't going to renew that lease unless you told him he would be sole dealer in Baltimore? A. In essence.

Q. And then you went over with him what he would be willing to do in the event you did make him the sole dealer in Baltimore. You went over his finances; you went over his records; you went over what he would be willing to do to try [1251] to get volume for you, didn't you? A. I don't know what you mean by "going over." We asked him what he might be willing to do if we should make such a decision.

Q. And you cleared with him what volume, did you, that he thought he could make? A. I think there was discussion of penetration of the market.

Q. Well, you must have done a lot of talking in an hour and a half, didn't you? A. Not necessarily. When you are talking on something of that type you are with men who are familiar with it and you finish it up in a short time. There was naturally some visiting.

* * *

[1252] Q. Now, then, Zell was pretty insistent, wasn't he, upon your giving an answer to what he said he wanted you to do? A. Well, he had to make a decision, and he was asking us for a decision.

Q. And he asked you for it in a certain time, didn't he? A. We didn't promise anything to him at any time at that meeting. We told him we would take it under consideration and give him a decision.

Q. And then you went back to Detroit, didn't you? A. That's right.

Q. And then at the top level you had a series of conferences about the matter, didn't you? A. That's right.

Q. Mr. Briggs was in on it? A. Yes, sir.

Q. Mr. Armstrong? A. Yes, sir.

Q. And you? A. Myself.

Q. And in fact you three had been handling this [1253] Webster proposition, hadn't you? A. That's right, and the divisional manager.

Q. How many conferences did you three have before you finally gave your answer to Zell? A. I can't tell you the exact number.

Q. More than one? A. I would certainly say so.

Q. I think you said you went back and looked for the records, didn't you? A. We reviewed some of the files, that's right.

Q. And you reviewed particularly Zell's files to find out whether in your judgment he could do what he said he would do if you would make him the sole dealer, didn't you? A. We would naturally check his ability to do it, financially and otherwise.

Q. Haven't you any memory as to what you found Zell's record was? A. As to what, sir?

Q. Let's start with that word again "penetration" of the market. A. Well, the penetration up to that time would be the cars sold by any of the other dealers plus Zell's during that period.

Q. Didn't you have a report from Zell as to how many cars he had sold during the previous years? [1254] A. Yes, but that is not penetration of the market, sir.

Q. What is it then. A. The penetration of the market, sir, is the results of the delivery of all the dealers acting in any given period.

Q. Now, can't you bring it down to the particular dealer and his capacity to penetrate the market? A. Not in a metropolitan area such as Baltimore, because the registrations come in for all concerned, and generally we look at it as a total penetration for a given area.

Q. All right. Well, did you have a zone composite dealers' financial statement? A. Yes, sir.

Q. That told you how Zell did, didn't it? A. Are you talking about profit or penetration?

Q. Penetration. A. The penetration that would be listed on a zone composite statement would be the penetration for all of Baltimore, which was actually made by all the dealers in that area.

* * *

[1267] Q. What did you say this morning? A. I said, as I recall, I said this, that the performance of Mr. Zell normally was four to one over Mr. Webster.

Q. Now, look at those two years and let's see what his performance was (handing document to the witness). A. Well, I just quoted it to you.

Q. Never went to three, did it? A. There is two and a half and two; two point seven nine to one and a quarter.

Q. Two point seven against one point two? A. That's right.

[1268] Q. So he didn't in 1950 and 1951, when the matter came up for your consideration, have a ratio of four to one, did he? A. Not in those years, but as normal performance; I would like to check the records; unless my memory fails me completely, I have the impression that Mr. Zell was performing somewhere three or four to one over Mr. Webster.

Q. Aren't these the records? A. Those two years, yes, sir.

Q. You would like to check them further back, is that it? A. Not necessarily. I say I will have to go back in my memory.

Q. You will have to go back on your memory? Then you are mistaken. A. Not my memory; that is my impression.

Q. But now those records don't bear out your memory, is that right? A. Not for those two years.

Q. Now, let's take Exhibit 119. Do you recall whether you looked that over when you were considering whether or not you would eliminate the other dealers in Baltimore? A. I can't recall. We undoubtedly did.

* * *

[1270] Q. And this is the picture of the man you said who was so far over and above everybody in Baltimore that it was essential to keep him as the sole dealer there? [1271] A. No, I said this, Mr. Leahy, that it was a matter of consideration of several things, No. 1 of which was the service to be rendered to our owners and added facilities to do it, and Mr. Webster didn't have it.

Q. Let's take this one at a time. What facilities are you talking about in which Mr. Webster was not able to handle service? A. I am talking about the service facilities.

Q. The service of Mr. Webster? A. I am talking about the number of stalls, the number of working facilities, that Mr. Zell had in comparison. If we were going to end up with one dealer, we needed a man who had the facilities to handle the owner-services in that area.

Q. How many stalls did Mr. Zell's firm have as compared with Mr. Webster for the quotas of each? A. I can't tell you, but it was obviously larger.

Q. Did you know? A. I knew at that time but I can't tell you today.

Q. Do you remember now? A. I can't tell you the exact number.

Q. Did you ever have a complaint from anybody that Mr. Webster wasn't giving service to his people? A. I can't recall, but undoubtedly we did. That could apply to both dealers.

[1272] Q. Do you recall a single instance in which there was any criticism of the service which the Webster Motor Company was rendering to patrons? A. The statement I made was two different things. No. 1, if Mr. Zell stepped out Mr. Webster couldn't begin to handle the service with his facilities.

Q. How do you know he couldn't? A. Without expanding them.

Q. Did you ask him to expand? A. He was absent.

Q. Now, wait a minute, Mr. Abernethy. Is that the answer you wish to leave? A. No, but he wasn't there when we checked into this thing.

Q. Did you ever call Mr. Webster and ask him whether or not he would expand his service? A. No, sir.

Q. Did you ever ask Mr. French? A. I never personally did, no.

Q. Did you ever authorize anybody in your firm to do it, or in your company? A. I would have to check to make certain.

Q. Now, haven't you any recollection of that? A. I can recall that we were after Mr. French at the time I was there.

[1273] Q. I am asking you whether or not when this decision as to whether you were going to have one or two dealers, as you put it, in Baltimore, you called Mr. Webster's firm and asked him if he would be willing to expand his facilities if he were made the sole dealer? A. No, we would see no reason to do that, based on the record up to that time.

Q. You didn't do it, did you? A. No, sir.

Q. According to the record, isn't it a fact Mr. Webster's firm was always in the black? A. As I recall, he was a profitable dealer.

Q. But that record wasn't such that you thought he should have been accorded the information or even given the request as to whether or not he would enlarge his facilities? A. No. We had a man who was already doing a larger volume than he was, and this man was active in his business.

Q. The man who had never made a dollar, and the man who had never met his quota, is that right? A. I wouldn't say he never made a dollar or never met his quota.

Q. So far as you know he never did, did he? A. Not during the particular years you just showed me.

Q. Those were the years you had particularly under consideration, weren't they? [1274] A. We would check the record farther back than that.

Q. Do you know how far back you went? A. No, I don't.

Q. Do you know whether in the conference on May 20th in Mr. Leahy's office you ever advised anybody that you were going to make Mr. Zell the sole dealer? A. May I have that question again?

The Court: Read the question.

The Reporter (Reading):—

"Do you know whether in the conference on May 20th in Mr. Leahy's office you ever advised anybody there that you were going to make Mr. Zell the sole dealer?" A. I am not certain whether I do or not, Mr. Leahy.

By Mr. Leahy:

Q. You know you didn't, don't you? A. I am not certain.

Q. Did anybody in that office ever advise anybody in the office anything about eliminating DeBaugh and eliminating Webster and making Zell the sole dealer? A. When we were in your office it was for the purpose of renewing——

Q. Please answer the question. A. Let me have—I don't quite understand it.

The Court: Just a moment. We will have the reporter read the question.

[1275] The Reporter (Reading):—

"Q. Did anybody in that office ever advise anybody in the office anything about eliminating DeBaugh and eliminating Webster and making Zell the sole dealer?"

A. I don't recall.

By Mr. Leahy:

Q. Mr. Beck was there, wasn't he? A. In your office?

Q. Yes. A. Yes, sir.

Q. You never heard him say anything about it either, did you? A. I don't recall.

Q. Mr. Armstrong was there, wasn't he? A. That's right.

Q. Did you hear him say anything about it? A. I don't recall every part of the conversation, Mr. Leahy.

Q. But you don't remember that, do you? A. I remember the purpose for which I was there.

Q. You were there to get a renewal, weren't you? A. That's right.

Q. All right; we are coming to that in a minute. Did you hear Mr. Porter say anything about your having come to the decision to eliminate the other dealers [1276] and make Zell the sole dealer? A. No, sir.

Q. Sir? A. I don't recall.

Q. You had had a letter away back on the 20th day of February, or shortly thereafter, which was written by Mr. Webster to Mr. Beck and forwarded by Mr. Beck to you, isn't that right? A. I recall the letter, yes, sir.

Q. You read it over, didn't you? A. At that time I sure did.

Q. You knew that Mr. Webster was protesting what Mr. Beck had stated in his letter of February 14th, didn't you? A. You mean as to his willingness to step out by July 1st?

Q. That's right. A. Yes, I recall that letter.

Q. And do you remember also a letter from Mr. Webster on the 9th of March, which you received through Mr. Beck, in which he was asking you to give him information as to any complaint you might have, any deficiency that was existing in his firm so that he could correct it? A. I don't recall the contents of the letter, sir.

Q. Do you remember the letter? A. Yes, sir, I remember the letter.

[1277] Q. You never answered either one, did you? A. No, I don't think—on advice of counsel we didn't answer it.

Q. What counsel advised you not to answer it? A. Our legal firm in Detroit.

Q. Why didn't you answer two letters you had received from a man who had been with you from 1937, as a dealer? A. Because Mr. Beck was handling it with him personally.

Q. Mr. Beck was handling it with counsel in Detroit? A. No; was handling it with Webster.

Mr. Leahy: Will you please read the question?

The Reporter (Reading): —

"Why didn't you answer two letters you had received from a man who had been with you from 1937, as a dealer?"

A. In the first place it would be up to the zone manager to answer it, and we probably advised him not to answer it.

By Mr. Leahy:

Q. Didn't you just tell us you had received advice of counsel in Detroit not to answer those two letters? A. We did clear those things because Mr. Beck had already made a mistake of sending a letter extending a contract which he had no authority to do, until July 1st.

Q. Are you talking about this letter of February 14th when you say he made a mistake of extending a contract? [1278] A. I mean he acted above his authority to extend.

Q. To extend what? A. To extend a contract that had already expired.

Q. In other words, there wasn't any contract, was there? A. That's right—at that time.

Q. And Webster was not a dealer, was he? A. He wasn't a dealer until we renewed the contract; he was when Mr.—again, that's a legal term—but we assumed that he was when Mr. Beck wrote the letter.

Q. That he was a dealer in February? A. In February?

Q. Yes. A. Yes.

Q. Now, on February 11th you had come to the conclusion to terminate Mr. Webster's contract, hadn't you? A. I am not just sure of the dates we advised Mr. Beck, but it seems to me it was before that, sir.

Q. So that as early as February 11th the home office, Detroit, had come to the conclusion that it wasn't going to

renew Webster? A. If that was after the date at which I telephoned Mr. Beck and told him we weren't going to renew, that we made a decision after our New York conference, then that's right. Q. Do you recall having gotten a letter on February [1279] 13th from your counsel, or did you see it, and I am showing you now Plaintiffs' Exhibit No. 33? A. This letter was addressed to Mr. Briggs.

Q. Oh, you saw it, though, didn't you? A. I saw it but I can't tell you when I saw it.

Q. Well, you saw it, didn't you? A. Yes.

Q. Now, does that refresh your recollection? A. Will you ask me the question over again, please?

Q. Now, does that refresh your recollection that it was the date of February 11th, and that I was right about it? A. I am confused as to the date that I telephoned Mr. Beck that we weren't going to renew. That's the reason I am hesitating.

Q. It was some time, Mr. Abernethy, before the letter of February 14th?

The Court: I wonder if that subject hasn't been sufficiently covered through other witnesses.

Mr. Leahy: All right, Your Honor.

[1280] Q. Is this the letter dated February 14th which you say proffers to Mr. Webster a renewal of a contract until July 1? A. That's right.

Q. What language is it in the letter you point to as being error and extending Mr. Webster's contract by way of renewal? A. I really think it is something our counsel should answer.

Q. No. You said he made a mistake. A. He put a date—contract had expired on March 31st.

Q. That is right. What is he talking about in there? A. And in the last paragraph of this letter he extends it to July 1st "as a deadline or the latest date for the termination of your Packard Dealer Sales Agreement".

Q. For what purpose? A. (No response.)

Q. Liquidation, isn't it? A. Liquidation of its parts and car inventory.

Q. Liquidation of anything that belongs to the business of the Packard franchise dealer, isn't that right? A. No, sir. He was only talking about what our franchise calls for, which is the proper return of current parts, current cars, signs and tools.

Q. In the event of the termination of the contract? [1281] A. Should we terminate. We do that for any dealer.

Q. In other words, your best interest could be served by the liquidation of the dealership. Now without going to the specific document which we have here in evidence, this Packard dealer's agreement carries a term in it as to what the dealer shall do on liquidation after the termination of the agreement? A. That's right, sir.

Q. Isn't that right? A. He didn't need to write that letter.

Q. And he gave him three months in which to liquidate, didn't he? A. Which is more than normal.

Q. What do you call "normal"? A. Thirty days.

Q. Thirty days to clean everything out, is that right? A. No, no, not to clean out his business, to clean out as part of our franchise. We normally do it in 30. Sometimes we extend to 45 days.

Q. Clean out anything that Packard is interested in under the franchise? A. That's right.

Q. The rest of it being any time he wants? A. That's right.

Q. Did the counsel to whom you referred this letter [1282] consider this as an extension of the agreement until July 1? A. As I recall I was so advised, Mr. Leahy.

Q. By whom? A. By Mr. Armstrong.

Q. Is he an attorney? A. No, but he works with our attorneys. He handles contracts.

The Court: I wonder if this isn't a question of law for the Court rather than for the witness, if it becomes material at all.

By Mr. Leahy:

Q. Do you remember this memorandum, Exhibit No. 110? A. Yes, sir.

Q. Do you remember reading it? A. Yes, sir.

Q. (Handing Plaintiff's Exhibit No. 37 to the witness.) You finally directed, didn't you, that the renewal with the termination date of July 1, 1952, should be signed by Webster if we could get him to do it? A. Mr. Beck felt, as I testified earlier, that his understanding was such with Mr. Richard Webster that Mr. Webster would sign the July 1st date.

Q. And you wanted him to try to get it, didn't you? A. Well, he was the man on the ground floor, and we felt that if he wanted to do that he could do it. Otherwise, [1283] we were willing at that time to renew the contract for a year.

Q. See what you said on that date. A. That's right.

Q. What's right? A. That after Beck counseled with him, and after I counseled with our people in Detroit.

Q. Who were your people? A. Well, Mr. Armstrong who was a legal contact. After all, I was in the sales business.

Q. What did you write on that? A. I wrote on here "Advise Beck by telephone to try to get the July 1st amendment signed by Mr. Webster," which he requested that he could do based on his conversation with Mr. Richard Webster.

Q. Do you recall having received a copy of the letter from counsel for Mr. Webster advising Packard that they considered that Packard had violated the antitrust laws? A. Yes, I remember he wrote a letter.

Q. Do you remember what date that was, Mr. Abernethy? A. I do not.

Q. Do you remember whether it was the 15th of April? A. I don't remember the date.

Q. What did you do about the letter, if anything? A. I would have turned it over to Mr. Armstrong, I [1284] believe.

Q. And was there any answer made to the letter that you know of from Detroit? A. I haven't seen the letter in two years, so I can't tell you. I don't know whether it was answered or not.

Q. Do you recall that even as late as May 6th, counsel for Mr. Webster were requesting Beck in a letter if they couldn't talk with your counsel? A. I remember generally something of that type.

Q. I am going to show you what has been identified as a letter dated the 6th of May, 1952.

Mr. Leahy: I doubt if this is in evidence, and I will offer it in evidence, if Your Honor please, from Mr. Leahy to Mr. Beck.

The Deputy Clerk: Plaintiff's Exhibit No. 120.

The Court: It may be admitted.

* * *

Mr. Leahy: And a letter from Mr. Beck to Mr. Abernethy enclosing this letter.

The Deputy Clerk: Plaintiff's Exhibit No. 121.

* * *

[1285] *By Mr. Leahy:*

Q. You saw both of these, did you not, and I am now showing you 120 and 121 for the plaintiff? A. Yes, sir.

Q. That's what brought you to Washington, wasn't it? A. I believe that's right.

Q. Yes. And who came along with you? A. Mr. Armstrong.

Q. When you got here you visited with Mr. Beck and Mr. Porter, didn't you? A. That's right.

Q. And you called for the complete file on the matter, didn't you? A. As I recall we then reviewed the zone file.

Q. So that you would be well advised when you came into a conference, isn't that right? A. Well, we would want to be alert to anything we didn't know up to that time that might be in the file, sure.

Q. Why didn't you bring your lawyers? A. Because we didn't think it was necessary. We were there to offer a contract to Mr. Webster which we did, and to Donald, which he didn't accept.

Q. You had already known he hadn't accepted it back on the 22nd day of April, didn't you? [1286] A. I recall distinctly that he didn't accept the three-month one, and then as I recall one of the fellows delivered a contract to a franchise, I believe, in Baltimore. But after all, it was in our capacity and responsibility to find out whether they were doing their jobs, and see if we couldn't get Mr. Webster to go ahead with this franchise and renew it beyond that time.

* * *

Q. Didn't you know, Mr. Abernethy, that as early as April 18, that Mr. Porter and Mr. Howell had been over to Mr. Webster's place of business in Baltimore with a contract? A. I recall generally that was so.

Q. And it was blank, wasn't it? A. I understand it was blank. I found that out after I came to Washington.

Q. So then you came over again on the 22nd of April with a contract which was filled out and left it there with the direction that it be returned back to the zone office by April 29, isn't that right? A. You mean we came over?

Q. You knew that, didn't you? A. Yes. I didn't come over, but some of our men did.

Q. Is that what brought you down here then because you [1287] thought you could get a renewal where Mr. Porter couldn't, Mr. Howell or Mr. Beck? A. Yes, I think that that was possible.

Q. That's the only reason you had? A. That's right.

Q. In coming down? A. To renew the franchise.

Q. And you wanted to be perfectly frank, I think you told counsel this morning? A. That's right.

Q. And fair? A. That's always my intent.

Q. Why didn't you lay your cards on the table and tell us everything about the situation and what your intentions were? A. What, for instance?

Q. Why didn't you tell us about the conference in New York? A. I didn't think that it was necessary.

Q. Why didn't you tell us that by the 11th day of February, 1952 you had already determined to eliminate Webster? A. We had determined to let his contract expire.

Q. Yes, and not renew him? A. And we wouldn't have renewed it if it hadn't been for—we felt that Mr. Beck had extended his contract, and [1288] we then agreed to renew for another year.

Q. All right. Then you knew that he had refused to be strung by a three-month liquidation of a business, didn't you? A. Well, again, that was something that Mr. Beck and Mr. Webster had verbally agreed to in Salisbury.

Q. You knew that, didn't you? A. Oh, yes.

Q. And you knew that he wouldn't sign it until July 1st, didn't you? A. That's right.

Q. And did you know that he had gone, Beck had gone to Deal Island this time with two others, Porter and Manorcha, to try to get July 1st cancellation date fixed in the contract? A. I knew he went there. I don't remember who was with him at the time.

Q. And did you know that he then and there told Webster definitely that he was going to be terminated, and that you, at Detroit—I don't mean you personally—but that you officials in Detroit had come to that conclusion? A. I don't know that. I don't recall that he said that. I know he went down there for that purpose.

Q. You didn't learn it? A. I beg pardon?

[1289] Q. You didn't learn it before you came to Washington? A. It could have been said to me, but I don't recall all of the conversation.

Q. Well, you got a report on it, didn't you? A. I may have. I haven't seen these reports in three years.

* * *

[1296] The Court: Before we resume, I would like to have counsel come to the bench for a moment.

(At the bench:)

The Court: Before we resume I want to call counsel's attention to what may not be as clear to those engaged in the battle itself as one who is watching it from the sidelines, so to speak, like the

Court. As I have followed the testimony so far, and I have checked my recollection of it by reading the transcript since the last session, I do not find that there is a dispute concerning a single fact. In fact, the plaintiffs' proof was very largely based on the Marshall Beck deposition. And the Marshall Beck deposition also gives the matter from the defendants' standpoint. The defendants' standpoint is enlarged by the Briggs' testimony, and duplicated very largely by the Abernethy testimony. But not a single fact is in dispute. It is just a question as to whether they had a legal right to do what they did. Now, that being so, I want to call attention to the fact—I am not going to instruct counsel how to try their case. They have a right to choose their own way, and this is only by way of suggestion—I am wondering whether [1297] too much testimony should be needed unless there is going to be something real new. After all much of the material on the cross examination of Abernethy, useful though it may be, is a repetition of what was on the Marshall Beck deposition that you read, and what came out on the cross examination of Briggs. Much of it is the sort of matter that you can use in the summing up to the jury quite as well, perhaps even more, effectively than cross examination. I have also noted your statement that you are going to have four or five more witnesses. Well, again, I am not going to stop you from trying the case in your own way, because that's counsel's right, but I do suggest that there shouldn't be too much duplication of the case, because in all the days of the trial we have had, I have yet to see a single fact that is in dispute.

Mr. Smith: I feel I should say, Your Honor, that I could not agree that the Beck deposition adequately covers the defendants' case.

The Court: I don't say that it does. I said you supplemented it by the Briggs' testimony. Of course, I don't know whether there is any more to your case or not, and if there is you should put it in, but I do suggest that duplication is not necessary because it isn't a case where there is a fact in dispute and you are going [1298] to have several witnesses to the same fact because the jury will have to resolve a conflict. I haven't yet found a fact in dispute.

Mr. Leahy: This is off the record, please.

(Off the record discussion.)

The Court: But I do hope that both sides will bear that in mind in cross examining and examining witnesses.

Mr. Leahy: I will. Thank you, Your Honor.

(In open court:)

The Court: You may proceed.

ROY ABERNETHY resumed the witness stand and testified further as follows:

Cross-Examination (Resumed) by Mr. Leahy:

Q. Mr. Abernethy, I want to show you Plaintiffs' Exhibit 19, which has hitherto been admitted in evidence. For counsel, that's Beck, May 27, 1952, to Mr. Abernethy with enclosure. Do you remember having received and read that? A. Yes, sir.

Q. At or about the date it was written? A. I can't remember the exact date, sir, but I remember reading the memorandum.

* * *

[1299] Q. * * * This is a letter from Mr. Beck to you with an enclosure of his report on the conference with the attorneys of the Webster Motor Car Company and Donald Webster on Tuesday, May 20, 1952, isn't it? A. Yes, sir.

Q. And that was written on the 27th of May to give you and for your files a report of that conference, isn't that right? A. Right.

Q. What did you do upon the receipt of this particular report? Do you recall, Mr. Abernethy? A. Well, I would undoubtedly pass it along to both Mr. Briggs and Mr. Armstrong.

[1300] Q. Do you recall having made any mental note that it was pretty correct coverage of the conference? A. Not without refreshing my memory by reading it because I haven't seen it for three years.

Q. You weren't shown this particular report, were you, while you were preparing for your testimony? A. No, sir, I don't recall having seen it.

Q. On the left-hand corner of that letter which transmits that report there is some handwriting. Could you identify in whose handwriting that is? A. That is my handwriting.

Q. And what does it say? A. It says, Mr. C. E. Briggs and Mr. Armstrong to note and return.

Q. That means that you forwarded it to both parties for them to note and then return to you? A. That is right, for my file.

Q. For your file? A. Right.

Q. Would you just look at the first page—just hurriedly, not in detail, but I do want you to look it over and refresh your recollection. A. Yes, sir.

Q. I think you told us on Friday last that your purpose in coming down, together with your associate—and [1301] who was your associate on that occasion? A. Mr. F. L. Armstrong.

Q. You and Mr. Armstrong came down to see if you could get a renewal of the contract; is that right? A. That is right.

Q. You note that in his report to you Mr. Beck says, The purpose of the conference was to find out just what the Webster Motor Car Company intended to do and what their specific charges would be in their threatened lawsuit. Was that the purpose, why you came down? A. I can understand why he made that statement, because after all we didn't know until we talked to Donald and you as to whether you would renew the franchise, and there had been threats of a lawsuit, which we considered to be a contractual suit at the time, and we came down for the purpose of reviewing it, and at that time I offered Donald a renewal of the franchise.

Q. You already had received my letter of April 15, 1952, Plaintiffs' Exhibit No. 40 in evidence; isn't that right? A. Yes, sir.

Q. Don't you know that states pretty fairly on its face that it was for a violation of the antitrust laws? A. Yes, but of course I wouldn't be concerned with that. We would turn it over to our counsel, and my job was [1302] commercial. My job was to follow out Mr. Briggs' instructions in seeing that a renewal, if possible, was made with Webster Motor Company.

Q. But you did know, didn't you, after talking with your counsel, that it was not contractual but rather the

violation of the antitrust Act which was brought into consideration? A. That may have been the conversation, but I would not know that; I would have no reason to know it.

Q. Didn't you know that when you came down here on May 20th? A. I may have known that you wrote that in the letter, sir.

Q. Didn't you know that your lawyers had talked over whether it constituted a violation of the antitrust Act? A. Most of those conversations were between Mr. Armstrong and the lawyers, and not myself.

Q. And Mr. Armstrong never reported the matter back to you? A. I knew that you had talked about an antitrust suit, but after all, I wasn't concerned with the legal action. I was concerned more or less with the renewal of the franchise.

Q. And weren't you asked, when the conference opened, why you didn't have your counsel with you? A. Yes, sir.

[1303] Q. And what was your answer as to the reason why you didn't bring your lawyers? A. As I recall, as I testified Friday, that we were there on commercial business, and we were not counsel, and we were attempting to work out the renewal of the franchise. I don't know the exact words, sir, but that was the general purport of the statement.

Q. Do you recall then at the conference Mr. Donald Webster said there wasn't much use going forward if the attorneys weren't there? A. Yes, but he did.

Q. You then remember Mr. Leahy saying, Go ahead, Mr. Webster, and tell them everything you know? A. In general I believe that is correct, sir.

Q. And he did, didn't he? A. Yes. He went back to away beyond any history that concerned us whatsoever.

Q. Did he go back to 1937? A. I can't remember the

exact date, but I do know he covered—well, ever since the time that Richard Webster was a salesman, as I recall.

Q. And did he go back to 1937 to tell you that Zell had been constantly restraining competition between the dealers under him and with him? A. I can't tell you exact words, Mr. Leahy. I do [1304] recall that he had something to do with the question of restraint of trade and things of that type, but I can't tell you what his exact statements were.

Q. Didn't he tell you that Zell had gone so far as to close Mr. Webster out in 1937 or 1938? A. I don't recall the details of that conversation.

Q. And didn't he hand you a photostatic copy of a letter which Mr. Webster had to agree to, containing the terms under which his franchise would be reestablished?

* * *

[1305] A. As I recall, Donald had a group of letters and as to what he actually showed me at the time, I can't recall the particulars of the letter.

[1306] Q. I ask you if he didn't hand you this paper that I now have in my hand, and you take it in yours, and read it through. A. I don't recall it distinctly, but I do recall something of this letter, Mr. Leahy.

Q. You do recall having that letter? And wasn't it passed around and read by every single Packard representative in that room? A. It could have.

The Court: Is this letter in evidence?

Mr. Leahy: I am just about to offer it now, if Your Honor please. I offer the letter on the letterhead of Zell Motor Car Company, dated August 31, 1938.

* * *

Mr. Denit: We have an objection to make to the letter.

The Court: You may come to the bench.

(At the bench:)

(The letter was handed to the Court.)

[1307] Mr. Denit: It is dated 1938, long prior to any of the transactions assailed in this complaint, and in this action.

Mr. Smith: It relates to the alleged pre-war conspiracy as to which Your Honor has not yet ruled.

Mr. Leahy: It is not offered for that purpose.

The Court: Let me read the letter.

(After reading letter:)

Do you care to be heard, Mr. Leahy, about that?

Mr. Leahy: They opened up the conference. We didn't. I never said anything about May 20th, and he told about going back to '37. He said, "I wasn't interested." I am just completing the conference on cross examination they opened up. Secondly, I want to show also that that's extremely important on this case on the conduct of Zell when he had full power in Baltimore with regard to restraints on competition.

The Court: That's what's bothering me. It seems to me—let me illustrate what is in my mind by an example. Suppose you are suing damages for fraud and deceit at common law. You wouldn't be permitted to show that the defendant committed a fraud and deceit on a prior occasion, and therefore he was the type of person who was likely to have committed it on the occasion involved in the lawsuit.

And of course, in a criminal case, you wouldn't be [1308] permitted to show that a defendant who is charged with robbery, for example, committed prior robberies, so that he was the kind of a person who was likely to commit robbery. I am inclined to sustain the objection.

Mr. Leahy: But I think, if Your Honor please, that the authorities are to the effect that where given acts are done and charged to have been done with the result that competition has been restrained, that if you can find that the same person in the same situation has done that thing before, they are admissible under the antitrust laws.

The Court: If there are such authorities, I would like to see them, because otherwise I am going to exclude it.

Mr. Leahy: I think it is admissible on what he read and knew and what we discussed. We have a right to that.

The Court: I am afraid we are opening a wide field. I don't recall to what extent this conference was opened up on direct examination of this witness. Can either of you gentlemen help me?

Mr. Denit: We asked him what was said and done by the parties at the conference.

The Court: You did ask him?

Mr. Denit: Yes, sir, what occurred according to his recollection.

The Court: Of course, you opened up the subject, and under the circumstances I am going to admit evidence of [1309] anything that was said and done at that conference, even though some of it might have been self serving. If it weren't for the fact that you opened up the subject I would exclude it on cross examination. But it seems to me that this

letter goes beyond that. Merely because at a conference somebody handed somebody else a document doesn't make that document admissible if it is otherwise inadmissible. I am going to sustain the objection to that. I think it would be prejudicial error if I let it in. We will mark this for identification.

* * *

Q. Do you recall what Mr. Webster said to you, and what answer you gave to him? A. To which question?

[1310] Q. At this conference, Donald Webster, you said he opened up the conference, and in response to my question to tell you everything that he, Donald Webster, knew—— A. Yes, and as I originally testified I think Donald took considerable time covering quite a history of the whole Baltimore situation, much of which was not of interest to me because I was there at the time for the purpose of clarifying——

* * *

Q. Do you know what he said about the Baltimore situation? A. Not in detail, I do not remember, sir.

Q. Do you remember his mentioning DeBaugh? A. Yes, I think I do.

Q. Do you remember of his saying how he felt toward DeBaugh or how his father felt toward DeBaugh's failure to get his renewal? A. Not in detail, I do not, sir.

Q. Do you remember anything about it? A. All I remember is the general tempo of the thing. As I testified the other day, Donald was a little steamed up over the situation, and he covered quite a history of the Baltimore situation, but the actual detail I do not remember.

Q. He covered the entire history of it, didn't he? [1311] A. I wouldn't say it was the entire history, but nevertheless he did cover quite a lot of it.

Q. Did he cover the history of his father's operation as a dealer under Zell when Zell was a distributor? A. Yes, that is one thing that stands out in my mind. He covered that, the detail of which I do not remember. But I do remember he made quite a story of that.

* * *

[1314] Q. Did you say that there were places which had one dealer in the United States? A. I know there are. I am trying to remember whether I testified to that. I believe I did, sir.

Q. Isn't it a fact that in setting up dealerships that the population of a given area is a very large factor in determining how the dealership shall be set up? A. No, that is not so.

Q. What is the factor? A. Well, there are several factors.

Q. What are they? A. No. 1, we analyze the potential in a given area. That potential is based on what competition is doing in that given area, and what percentage of that market that we intend to try to get. Then we have to take into determination the capital, the ability of the man, No. 1, and the capital and his facilities in order to decide whether one dealer, two dealers, or three dealers, and often then we compare with the number of dealers that other competition has. In other words, it is a case of selecting one good dealer that can get the potential of a given area where normally you might expect to do it with two. There are other times when you have to put three [1315] dealers in, based on the circumstances in a given situation. So there isn't any definite pattern, depending on the ability of the man, and his attitude, and so forth, toward getting the penetration that we are after in any given area.

Q. And Packard had determined, beginning in 1946, when it resumed manufacture for sale to the public, that

Baltimore should be three, four, or even five dealers, didn't it? A. Yes, and that was done for a purpose, sir.

Q. For the purpose of the best interests of Packard? A. The purpose was to get the penetration. At that time it was felt—to answer your question properly—it was felt that we would reach a volume of 200,000 cars, and you know what happened during that period, with the fact that steel was not available, and therefore our company was never able to reach it; through act of God or otherwise we lost our steel account by some of the larger companies absorbing that.

Q. No matter whether steel was in production or wasn't, Packard set up some three or four or five dealers direct with the factory, in place of a single distributorship in Baltimore, after the war, didn't it? A. As I recall that is correct, sir.

Q. And then continued to maintain the multiple dealers direct with the factory in Baltimore up until April [1316] 1, 1952? A. I can't tell you the exact date, but sometime in that period.

Q. Did you say that the years '46, '47, and '48 were abnormal years in the sense that it was a buyer's market? A. I did.

Q. A buyer's market of what cars? A. A buyer's market of most of the cars that could be produced, that steel was available to make them.

Q. But you weren't producing, were you, in those years? A. We were unable to get the steel.

Q. Well, the answer is you weren't producing, were you? A. No.

* * *

[1319] Q. Do you know how many cars the Webster Motor Car Company got in 1946 to sell of Packards? A. I would not know.

Q. Do you know how many they got in '47? A. Not without looking at the records.

Q. Or in 1948? A. I do not.

Q. When you say they were abnormal years in so far as Packard was concerned, they were abnormal because Packard wasn't in production, is that right? A. No. It was a strong buyer's market, whether it was for Packard, used cars, or anything else, during that period.

Q. If you couldn't get the Packard cars, what difference did it make whether it was normal or abnormal from the standpoint of a buyer's market on the profits that a dealer [1320] might make? A. It makes a whale of a difference—the difference between supply and demand on the number of cars a dealer has means that a dealer with a limited amount will get all the profit he can during that period—a high gross profit—whereas if he has a large supply and it is really a seller's market he will slough off on his profits in order to deliver more cars.

Q. Mr. Abernethy, would you say that the Packard dealers in the United States could make large profits when 46,000 cars were to be distributed among 1,500 dealers? A. I do not recall the figures in the over-all picture, but I do know the dealers as a whole made large profits, because they retained high gross profits on individual sales plus the used cars they traded in on those individual sales.

Q. Weren't the Packard dealers in the second-hand car business in '46, '47, '48 and '49? A. I think every dealer was in the second-hand business in '46 and '47, not just Packard, but every dealer.

Q. And '48 and '49, were they also in the second-hand car business? A. We were going through the transition period. Dealers were all in that position at that time, but they weren't picking up the profits in 1949 that they were in '46, '47 and '48.

[1321] Q. Did anything hit you in '49 that also restrained the sale of Packards? A. Well, sometime in '49 there was a slight recession, as I recall.

Q. Due to what? A. At the moment I can't——

Q. Don't you remember the model? A. No, when I said "recession" I wasn't speaking of Packard. I was speaking of the industry as a whole.

Q. Well, I am speaking of the Packard industry as a whole. A. I didn't say the Packard industry as a whole; I said the automobile industry as a whole, there was a slight recession.

Q. Now, let's talk about Packard. We have got enough to talk about in Packard; let's forget the rest of the industry.

> The Court: I wonder if this question of the model hasn't been sufficiently established by both sides, that there was a model that was selling slowly because it didn't meet with popular approval.
>
> Mr. Leahy: I think it has, but I want to get where the abnormality of these years was concerned, if Your Honor please.

By Mr. Leahy:

[1322] Q. Isn't it a fact that the years 1950 and 1951 were bad years for Packard? A. Yes, '50 and '51 weren't good years.

Q. Were good years for Packard? A. Were not good years.

Q. Were not good years. And isn't it a fact your dealers had been making these over-allowances in taking in your second-hand old model that didn't have public acceptance? A. I couldn't answer that directly. The amount of allowance anyone gives, Mr. Leahy, depends on his ability

at salesmanship, and some dealers over-allow and some dealers do not.

Q. You don't know? A. Not in detail.

Q. You were a dealer at that time in Hartford? A. That is right.

Q. Didn't you have to take in an awful lot of old models of Packard that had not met public acceptance? A. No, I didn't have to do it.

Q. Well, you did it, didn't you? A. No. It is normal history, as Mr. Webster, Mr. Richard Webster, well knows, that the trade-in is about 60 per cent of your own make on the next year's business—about 60 per cent.

Q. That is because the Packard man comes to the [1323] Packard dealer in order to get a better trade? A. And a Buick man goes to a Buick dealer in order to get a better trade.

Q. And a Buick man goes to a Buick dealer? A. That is right.

Q. And your Packard man who had bought the car that wasn't acceptable to the public came to the Packard dealer to trade it in when you got a better model in '51 and '52? A. You mean the Packard customer came to the Packard dealer?

Q. That's right. A. I don't think there was any greater percentage during those years of return, or what we call repeat business, of our customers, than any other year.

Q. I want to show you what has been introduced in evidence as Plaintiffs' Exhibit No. 113. Did you know Mr. Osband? A. Very well.

Q. Who was he? A. Well, he was a long-time employee with Packard.

Q. In what capacity? A. In several capacities. In this letter here he was national used car manager.

Q. What does he say in the first paragraph of that circular? [1324] A. He refers to help moving '48 and '49 used Packards as they are traded in on our newer job with new styling—normal procedure.

Q. The letter is dated March 15th, isn't it, 1951? A. That is right.

Q. "We've had a good many requests for help in moving '48 and '49 used Packards. It seems that so many of our customers like our new styling they are offering their old cars at a faster rate than you can move them." A. That is normal in the industry, Mr. Leahy.

Q. Is that normal? Is that your answer now? A. That is normal in the industry when you make a complete change in styling.

Q. And the change in styling was from the old model which was not accepted, to a new model in '51-'52? A. A complete new styling, that is right.

Q. That is right, isn't it? A. That always happens.

* * *

[1325] *Redirect Examination by Mr. Denit:*

* * *

[1326] Q. Mr. Abernethy, is there any difference between a buyer's market in Packard automobiles and a buyer's market generally? A. No.

Q. In 1946, '47 and '48, was there a buyer's market in Packard automobiles? A. Yes.

Q. On what basis do you make that statement? A. The demand was greater than the supply.

Q. Was that true with respect to automobiles generally? A. Yes, sir.

[1327] Q. What effect did that have upon the profit of the dealer? A. He retained large gross profits on individual unit sales, and therefore his profits were high.

Q. When the demand is greater than the supply, what effect does that have upon price? A. It had no effect upon price of the new car itself. Dealers, however, when the demand was greater than the supply, did not in all cases give the customer a fair trade on their used car, and as a result they received not only the full gross profit of the new car, but a gross profit of a sizable amount, and of varying amounts, on the used car.

Q. When the demand is greater than the supply, doesn't that mean you have a seller's market rather than a buyer's market? A. Yes, I guess that's right. I am saying it backwards. It is a seller's market when the demand is greater than the supply.

* * *

[1328] *By Mr. Denit:*

Q. In determining the most suitable dealer in a given area, of what significance is quota? [1329] A. Quota is only a factor, an objective, set up to determine the facilities, and to determine capital requirements and a sales objective.

Q. How does it influence the manufacturer in making a selection of a dealer? A. Well, the quota that you set up determines the size dealer and the amount of capital, the type of facilities, and so forth, and the man's ability to sell that many automobiles, or somewhere near that sales objective.

Q. Does the fact that one dealer is meeting his quota and another dealer is not, have any significance in determining whether to continue with the one or the other? A. Quotas in a single city deal have more relationship to the actual potential than it does in a metropolitan deal. Registrations from which we determine quotas based upon our expected year's production are not broken down in a given metropolitan area. So the quotas established with each

dealer in a metropolitan area are not always in true relation to the actual potential of the given dealer, in other words, but the total of those quotas are. They are to be adjusted where there is more than one dealer in a metropolitan area.

Q. Now, the quota in Baltimore for 1952, what was the quota which was determined for the entire city? A. I don't recall the total quota, but what our zone office would do, would do this——

* * *

[1330] Q. In determining the quota to be assigned the Webster organization, what procedure was followed by Packard in 1952? A. They would take the total potential of Baltimore area in relation to the zone total potential, and take that per cent and apply it against the quota assigned the zone from Detroit. Then they would take the total quota for the Baltimore area and break it down among the dealers at that time.

Q. Do you know why 175 was assigned as the Webster quota? A. I do not, unless in the judgment of the zone manager he felt that's what he might be capable of doing.

Q. Then is it a fact that the remaining portion of the quota was assigned to Zell? A. The difference would be assigned to the other dealer or dealers.

Q. Was there any significance in the matter of the assignment of the Webster and Zell quotas? [1331] A. I don't recall if there was, other than past experience and the zone manager's judgment on getting his total potential out of the Baltimore area. He divided it up on his knowledge of those two dealerships at that time.

* * *

Q. Was there any significance in whether Webster or Zell met their quota? A. Well, naturally, we would hold a quota up as a sales objective for them, and as I previously said, in determining facilities and working capital, but what we would be interested in would be the total penetration of the Baltimore area as both dealers would perform in that respect.

* * *

[1332] Q. When was Webster offered a one year renewal contract?

The Court: I thought we had been over that, Mr. Denit.

Mr. Denit: I am not clear from the testimony just exactly when.

The Court: Very well. If there is any doubt about it you may fix the date.

Mr. Leahy: I think the record is clear, if Your Honor please. April 22nd, May 20th. Those are the dates.

Mr. Denit: That's all right, if that's clear to you.

Mr. Leahy: That's what he said.

Mr. Denit: That's all, sir.

The Court: Step down.

* * *

DONALD DENT WEBSTER, was called as a witness by the defendants and, being first duly sworn, was examined and testified as follows:

[1333] *Direct Examination by Mr. Denit:*

Q. What is your full name, please, sir? A. Donald Dent Webster.

Q. What is your business or profession? A. I am an attorney by profession.

Q. When were you admitted to the bar? A. I was admitted to the bar of the State of Maryland in 1949.

Q. Did you then engage in practice? A. I did.

Q. At that time were you connected with the Webster Motor Car Company? A. I was connected with the Webster Motor Car Company in 1949, Mr. Denit, and I am not sure whether when I came from law school I immediately went on Webster's pay roll or not. I don't think I did.

Q. How long did you remain with Webster Motor Car Company? A. It seems to me I went almost full time with the Webster Motor Car Company in November of '49, at the time of the fire. I believe that I remained with them until January or February of 1952 when I went with the Department of Justice.

Q. Was it on February 7, 1952 that you severed your [1334] connection with the motor car business? A. I don't recall the date, and I would like to say that I don't think that it is appropriate to say that I severed my connection. I did not sever my connection.

Q. Did you ever again go into the business of the motor car company and perform any active duties in that business? A. I expect you could say that I did, yes.

Q. What did you do? A. I have acted as legal adviser to my father in this problem, so I assume that that could be said to be services for the Webster Motor Car Company.

Q. You did nothing in connection with the merchandising aspects of the company, did you? A. I did. I consulted with Harry French and my father, Jim Fincham and George Graff, yes.

Q. At what time? A. Over week ends. Baltimore is you know how far from Washington.

Q. In 1952? A. I would say 1949 from the day I left law school.

The Court: No. You were asked about '52. Confine yourself to answering questions.

The Witness: I am sorry, Your Honor. Yes, in 1952.

By Mr. Denit:

[1335] Q. From February of 1952 on were you a full time employee in the Department of Justice? A. From February of '52 I was a full time employee in the Department of Justice until January of 1954, I believe.

Q. Did your employment involve actual attendance upon duties five days a week? A. At least.

Q. So that the free time you had was on Saturday and Sunday? A. And in the evening.

Q. Did you discharge any active functions with the Webster Motor Car Company during the evenings after February 7, 1952? A. It is a family matter, Mr. Denit. I would have to say, yes, I did.

Q. What did you do? A. Many times my father would call me, or Mr. French would call me, or Mr. Fincham would call me. They would tell me that they were planning to buy this or buy that, what did I think of it. Discussions were held. Even the used car lot was a problem at one time.

Q. When was that? A. I don't recall the exact date. I think it was in 1952, but I am not positive. It might have been 1951. In [1336] any event, that's just one that comes to mind quickly. There were many problems that they consulted me about.

Q. And that was after your hours in the Department of Justice or on Saturday or Sunday? A. No, I don't say

that I never received a telephone call during the day at the Department of Justice from my father or from Harry Easench.

Q. Did you receive a telephone call from your father during the day on February 11, 1952? A. February 11, 1952, no, sir.

Q. Do you know where your father was at that time? A. From the testimony that he has given, he was at Deal Island. I know that from the testimony, yes.

Q. Was it Deal Island or Salisbury? A. Deal Island, February 11, yes. Deal Island.

Q. And he never talked to you at all during the day of February 11? A. During the day of February 11, no. February 13, yes, perhaps.

Q. Did he talk to you on February 13? A. Yes, on February 13th he did.

Q. When? A. He called me in the afternoon. He told me that—do you want me to go on?

Q. What did he say to you? [1337] A. All right. He told me that Marshall Beck and Cliff Porter had been down and had had lunch with him at the Wicomico Hotel. He said, "Don, I don't know what to make of this." He said, "During this luncheon conversation, very pleasant, but somewhere in the middle of the conversation, Marshall Beck said, 'Dick, your friends at the factory think it is time for you to liquidate the Webster Motor Car Company.'" He said, "That took me by surprise." He said Marshall Beck went on to say that he knew that this was the time to liquidate, everything was at a peak. He said, "I listened, and I talked with them, and I tried to be nice, and I asked Marshall. I said, 'Marshall, is there anything wrong with the Webster Motor Car Company, is there anything I ought to know?' He said, 'Not a thing, Dick.'" He said, "I still didn't get it. I was thinking that maybe this $400,000,000

war contract that Packard had, maybe that was going to cause them to go out of the automobile business, and Marshall had been out to the factory, and my old friends out there were passing on an advance tip through Marshall to me to go ahead and get out of the automobile business." He said, "That's what was going around in my mind when Marshall Beck said, 'Dick, I know that Sidney Zell is going [1338] to be fair.'" I said, "Well, Dad, you are a worrier. Don't let that upset you. Just sit tight." He said, "Don, I know from what I went through in '37 and '38 with the same crowd that there is more to it than that." I said, "Well, Dad, you don't know it. Just sit tight and don't worry." That is the conversation I had, as I recall it, with my father on February 13, 1952.

Q. Now, thereafter, your father received a letter from Mr. Beck dated February 14, 1952, did he not? A. That is correct.

Q. Did you discuss that letter with him? A. We certainly did.

Q. Did you assist him in the preparation of his reply to that letter? A. I did.

Q. Thereafter your father wrote to Mr. Beck in March, did he not? A. That is correct.

Q. Did you assist him in the preparation of that letter? A. I certainly did.

Q. Thereafter there was an arrangement made for you [1339] and your father to see Mr. DeBaugh, is that correct? A. On April 7th. We arranged for Mr. DeBaugh to come down and tell us the details of his disenfranchisement as we had heard of it only secondhand through Mr. French. And at our request, or Mr. French's request, I am not sure who made the request, the fact is that Mr. DeBaugh and his son Charles came down to the Webster Motor Car Company showroom, and there discussed with us their plight, and we

ours with them, and I would say that was on April 7th.

Q. On that occasion did you ask Mr. DeBaugh to join with you in an antitrust suit against Packard Motor Car Company? A. Would you like me to tell you the whole conversation as I recall it?

[1340] Q. I would like to have an answer to that question. A. The answer to that question is that we advised Mr. DeBaugh that we thought that he had, as we thought we had, a perfectly good and valid antitrust action against the Packard Motor Car Company and the Zell Motor Car Company. Now, I think the question is, Did we advise him to join with us?

Q. Yes. A. I believe that while that is not precisely the details of it, that the answer should be yes, that we did advise him that he should sue. Now, the joining of us—we advised him to proceed separately or jointly.

Q. Did you read to him Sections 1 and 15 of the Sherman Act? A. We did. I did, yes.

Q. Did your father advise Mr. DeBaugh to join in pursuing Zell and Packard through channels designed to protect his legal rights?

The Court: I am wondering how this is all relevant, Mr. Denit. Of course, the other side isn't objecting, but at the same time, I would like to keep the trial in proper bounds.

The Witness: I certainly have no objection——

[1341] The Court: Just a moment; you are a witness.

The Witness: I am sorry.

Mr. Denit: We asked Mr. DeBaugh questions

calculated to bring this out, if Your Honor please, and Mr. DeBaugh made certain categorical denials.

The Court: I understand you asked those questions of Mr. DeBaugh. I am going to ask counsel to come to the bench.

(At the bench:)

The Court: Of course, you may not make a line of inquiry admissible merely by the fact that you cross-examine some other witness about it. Now, how is it admissible to show that the fact was, if it be the fact, that this plaintiff tried to instigate somebody else to bring suit? How is that relevant? If it is relevant I will let it in, but I don't see its relevancy.

Mr. Smith: May I answer it, Your Honor?

The Court: Yes, indeed.

Mr. Smith: We expect to show through this witness that through Donald Webster's influence Webster decided that it preferred a lawsuit to the renewal that was offered to it. That refutes the possible testimony by the plaintiff that it was justified in refusing the renewal of its agreement because of alleged bad faith upon the part of the corporation.

The Court: That is admissible, of course, and I [1342] will admit that evidence, but how does the fact that they instigated DeBaugh, unsuccessfully, or tried to instigate him to bring suit, bear on this issue?

Mr. Smith: It is in pursuance of the plan.

The Court: Very well. I will allow it.

(In open court:)

Mr. Denit: I think we have an unanswered question.

The Court: You may read the question, please, Mrs. MacReynolds.

The Reporter (Reading):—

"Question: Did your father advise Mr. DeBaugh to join in pursuing Zell and Packard through channels designed to protect his legal rights?"

A. I think we all did, Mr. Denit.

By Mr. Denit:

Q. Did you tell DeBaugh that whether he joined or not, you were about to begin legal action? A. Yes, that is correct.

Q. Did you tell DeBaugh that in all probability the conspirators would suborn him to commit prejury? A. I believe we did.

Q. Did you advise DeBaugh in substance that the conspirators would try to get him to sign a contract and date it back? A. I believe we did, yes.

[1343] Q. Why did you advise him that the conspirators would suborn him to perjury? A. Beginning in 1952, in February of '52, the representatives of the Packard Motor Car Company, and I refer in particular to Marshall Beck and Cliff Porter—by that time this friend Abernethy had not put in an appearance, nor had Armstrong—but our dealings, my father had been dealing with Marshall Beck and Cliff Porter——

The Court: No, I don't think you are answering the question. Will the reporter please read the question? Direct your answer to the question.

The Reporter (Reading):—

"Why did you advise him that the conspirators would suborn him to perjury?"

A. Your Honor, he asked me——

The Court: Just a moment. Will you read the question, Mrs. MacReynolds?

The Reporter (Reading):—

"Question: Why did you advise him that the conspirators would suborn him to perjury?"

A. We believed they would.

* * *

[1344] Q. When you talked to Mr. DeBaugh on April 8th about conspirators, did you include Zell as one of the conspirators? A. I believe it was April 7th, Mr. Denit. Yes, we did.

The Court: Try to keep your voice up, Mr. Webster.

A. (Continuing) We did include Zell, the Zell Motor Car Company and Mr. Sidney Zell as conspirators, yes.

By Mr. Denit:

Q. At any time prior to this DeBaugh visit had you advised with Mr. Zell about going into business with him? A. No, I would not say it in those terms. In 1951, I believe, or '50, my father and Mr. French and I had heard, and we discussed this, that the Zell Motor Car Company was going to get the Cadillac franchise. And Dad asked me to go down and see if I could find out from Sidney Zell whether that was actually true, because if Zell was going to get the Cadillac franchise Mr. French, my father and I wanted to take up the slack with Zell going out of business. And I went down, at my father's request—I am not sure whether my dad called and made an appointment with Mr. Zell before I went down—I think he did—but

in any event I went down to the Zell Motor Car Company. I [1345]think that is what you are referring to, is it not?

Q. Can you tell us whether it was 1950 or '51? A. It would have been '50 or '51, but I don't know which date.

Q. If it were in '50, there would be more Packard dealers in Baltimore than Webster and Zell, wouldn't there? A. In 1950——

The Court: Just answer yes or no.

The Witness: Yes.

By Mr. Denit:

Q. And if it were '51 there would have been more dealers in Baltimore than Zell and Webster, wouldn't there? A. Yes.

The Court: We have it of record that there were three, Mr. Denit. Don't let's consume time unnecessarily.

By Mr. Denit:

Q. Did you make a memorandum of your visit with Mr. Zell? A. No, I did not.

Q. Did you ask Mr. Zell whether he would consider going into the Cadillac business with your father's organization? A. After Mr. Zell had told me that he had tried to get Cadillac, and had been to the factory, to the Cadillac factory, and had been unsuccessful, and he didn't think it [1346] could be got I, not knowing whether to believe him, said something to this effect——

The Court: I think you are going beyond the confines of the question. Will the reporter please read the question?

The Reporter (Reading):—

"Question: Did you ask Mr. Zell whether he would consider going into the Cadillac business with your father's organization?"

A. I said to Mr. Zell at that stage in the conversation, Would you think that we could both get it if we tried together? And he said, Well, I don't know, Donald, that's a pretty good idea; why don't you go and try?

By Mr. Denit:

Q. Well, at that time you had sufficient confidence in his integrity and honesty to go into business with him, didn't you? A. Absolutely not.

Q. Were you telling him the truth when you suggested that you both go into business together? A. I had just explained to you, Mr. Denit, that I tried to find out whether Mr. Zell was telling us the truth. After 1937 we would never have gone——

The Court: Just a moment. Please don't go on [1347] after you answer the question. Will counsel come to the bench?

(At the bench:)

The Court: You know you are likely to be confronted with a motion for a mistrial if he keeps on like this, and I will have to pass on it.

Mr. Leahy: I thought, if Your Honor please, he asked him if he had confidence.

The Court: I know, but then he adds extraneous remarks.

Mr. Leahy: He said after 1937 he never had confidence enough to go into business with him.

The Court: I know, but when a question calls for a yes or no answer, and the person adds a prejudicial

comment, I think that is not very desirable. I think he ought to control himself, especially as he is a lawyer and ought to know that. Well, let's proceed.

(In open court:)

The Court: Mr. Webster, I am going to again remind you that you must answer each question head on, and that's all, and don't add any extraneous remarks, even if they are relevant.

The Witness: I will certainly try to.

* * *

[1348] Q. When you visited with Mr. Zell, whether it was in '51 or '50, and suggested to him that maybe your father's organization and his organization could get a Cadillac dealership together, you weren't sincerely and honestly suggesting that to him as a business partnership, were you? A. Definitely not.

Q. You were just trying to feel him out to find out something about his connections? A. Quite correct.

Q. Without disclosing to him that you never really intended to go into business with him? A. That is correct.

Q. Now, Mr. Webster, you had a conversation with Mr. Marshall Beck on March 1, 1952, didn't you? A. Yes, I did.

Q. And you made a memorandum concerning that conversation? A. I believe I did.

Q. Is there any doubt in your mind about it? A. No, there is no doubt in my mind.

[1349] Q. Will you look at this paper I show you and tell us what that is, whether that is a memorandum of the conversation? A. Yes, this is the memorandum.

Q. And when did you make it? A. I made it at 11:30 a. m. Saturday, March 1, 1952.

Q. Where? A. I made it at 3816 Jennifer Street, Washington, D. C.

* * *

Mr. Denit: We offer it in evidence, yes.

The Deputy Clerk: Defendants' Exhibit No. 24.

* * *

[1353] Q. Now, at that time had you studied the anti-trust laws and the cases? A. I had not.

Q. When did you make your study of the law and the cases? A. Between March 1st and March 9th I read some anti-trust laws and some cases.

Q. Did you correctly and truthfully record the conversation that you had with Beck in that memorandum? A. I certainly tried to, and I believe I did.

Q. And you recorded all of the responses that you made to what he said to you, is that correct? A. To the best of my recollection, it is.

[1354] Q. Why did you make a memorandum of that conversation, Mr. Webster. A. I made a memorandum of that conversation, Mr. Denit, because my father's feeling and mine——

The Court: Now you are cross examining your own witness.

Mr. Denit: He is a hostile witness, if the Court please.

The Court: Well, I know. You offered this memorandum in evidence. It is your exhibit. I think there has to be some limitation on that type of cross examination. You may proceed, but I just call your attention to the fact that there is a limitation to which that can go.

The Witness: I made the memorandum, Mr. Denit, because my father, Harry French, and I felt that in view of the distorted letter of Marshall Be .'s of February 14 concerning what supposedly had gone on at the Salisbury luncheon, that there was something deceitful going on behind the scenes, especially in the conversation of March 1st when Mr. Beck let slip that he and the Eastern Regional manager had gone over to talk with Mr. Zell about Webster. And when I later in the conversation said to Mr. Beck, "Well, Mr. Beck, I certainly hope that you haven't discussed our plight, the fact that you might not renew our franchise, I hope you haven't discussed that with Mr. Zell." [1355] Mr. Beck said, "Oh, no, Donald, no, no." And I think that memorandum will show that I went back in that paragraph——

The Court: No, no. You were asked to state why you made the memorandum. Now, have you completed your answer?

The Witness: I have.

The Court: Don't go beyond the question. If you haven't completed your answer, you may finish.

The Witness: May I say one further thing then to complete my answer, Your Honor? I believe I made the memorandum so that my recollection would be refreshed, would be fresh, if it ever needed to be brought forth as it is being today.

By Mr. Denit:

Q. Well, in the conversation with Mr. Beck, you did tell him that your father would be willing to sell out the motor car business, didn't you? A. May I see the memorandum, please?

The Court: Will you read the question, please?

The Reporter (Reading):—

"Q. Well, in the conversation with Mr. Beck, you did tell him that your father would be willing to sell out the motor car business, didn't you?"

The Witness: After he told me that our franchise would not be renewed, I made such a statement in the memorandum and in the conversation with Mr. Beck.

[1356] Q. Now, Mr. Webster, were you calling Mr. Beck for the purpose of having Packard renew the Webster Motor Car franchise? A. Absolutely.

Q. And you discussed with your father the question of having it renewed, did you, prior to the conversation? A. Yes.

Q. There was a renewal contract submitted to Webster Motor Car Company in April, and again in June, wasn't there? A. After notice of suit, a contract was submitted to us on April 22nd, and in—I think that is the same contract that we still had in June. No further offers were made.

Q. Did you have sufficient contact with the business to know that the business was still buying cars, new cars, after March 31st? A. I advised the company,——

Q. No, did you have sufficient contact to know whether the business was buying cars after March 31st? A. I did.

Q. And it was buying them under the terms of the existing dealership contract, wasn't it? A. Absolutely not.

Q. Did the company pay dealer prices? A. The company paid the same prices that it had always paid. I assume they were dealer prices.

[1357] Q. You know they were, don't you? A. I have not examined the invoices, but I will say yes to the question. Yes, we paid dealer prices.

Q. And the company continued to purchase parts at dealer prices after March 31st? A. Yes, we did.

Q. When was the conclusion reached, so far as you know, not to accept the renewal under any circumstances? A. On June 11th, Mr. Leahy informed Packard.

The Court: No, the question——

The Witness: On June 11th.

The Court: The question is, When was the conclusion reached?

The Witness: On June 11th we decided. On June 11th we decided that since Packard— —Your Honor, I cannot answer the question in those terms.

The Court: Yes, you can.

The Witness: On June 11th the negotiations broke off. Is that——

By Mr. Denit:

Q. Well, you were not really negotiating to get a renewal of the contract on June 11th? A. Absolutely.

Q. I thought you told us you had concluded to file the [1358] lawsuit. A. We had not concluded to file the lawsuit to the absolute exclusion of getting back our franchise.

Q. You mean you were going to do both, you were going to get back the franchise, and also file a lawsuit? A. Mr. Leahy's letter in my opinion speaks for itself.

Q. I am not asking you about Mr. Leahy's letter. I am asking whether Webster Motor Car Company through you and your father—— A. We were going to accept the franchise in preference to the lawsuit the moment that the officials of the Packard Motor Car Company would give us assurance that they were dealing with us in good faith. That's my answer.

Q. Now, Mr. Webster, did you have any idea what assurances you were expecting from Packard? A. Yes.

Q. Didn't you testify on deposition that at the time you received that letter you didn't have in mind any particular assurances from Packard? A. My assurances today are the same as they were—my belief of the assurances which we would have wanted are the same, is the same today as it was at the time of my deposition.

Q. And at that time you had no definite idea of the assurances you required, did you? [1359] A. Assurances of good faith, if that is a definite idea. We certainly had that.

Q. Didn't you testify that you wanted, you had no definite idea of assurances, but you would take whatever satisfied Mr. Leahy? A. And I am sure that that is correct.

Q. Had you discussed the kind of assurances you would require, from your counsel? A. Had I discussed with my counsel?

Q. Yes. A. Yes. We had discussed that.

Q. And the kind of assurances that you discussed with counsel were what? A. The assurance that the contract was being offered to us in the same spirit that it had always been offered before, up until this year. The assurance that it was not a postponement of, I think as Mr. Leahy referred to it, a death sentence. The assurance that it was not offered to us as a subterfuge to just destroy us during that year and make Zell the sole dealer on March 31, '53.

Q. Had you ever had that kind of assurance before? A. We certainly had.

Q. Any in writing? A. Always in spirit from Sam Braden and Marshall Beck [1360] up until 1952, we had enough confidence in Packard's good faith to make the kind of investment that we did. Yes, I will say it sufficiently, whether in writing or not. And I don't think we had it in writing.

Q. You know you never had it in writing, don't you? A. I know that we have never had anything but our Packard dealer sales agreement, and I assume that that in writing constitutes an expression of Packard's good faith. I wouldn't doubt Packard's good faith as long as they gave us no reason to, and they never did.

Q. Now, let's see. On May 20, 1952, you were present at a conference in Mr. Leahy's office, weren't you? A. I was.

Q. And two representatives of the Packard factory were there, were they not? A. Two of the factory and two of the zone office.

Q. So that there were four representatives of Packard at that meeting, is that right? A. That is correct.

Q. Weren't you promised in definite and specific terms that Webster Motor Company could have its renewal contract until March 31, 1953, and then the matter of an additional or further renewal would be considered on its merits as it always had been? A. Absolutely not.

[1361] Q. You heard Mr. Abernethy testify here, didn't you? A. I did.

Q. And you say that Mr. Abernethy didn't tell you? A. I say that Mr. Abernethy did not make any such statement to Mr. Leahy, to Colonel Hughes, or to myself, at that conference.

Q. What did he say? A. Mr. Abernethy said toward the end of the conference, Well, we have offered you a contract a regular Packard dealer sales agreement, to run until March 31, '53, and we want to know what you are going to do about it. Just prior to that Mr. Abernethy had asserted that Packard had just cancelled all dealers but one in four or five metropolitan areas, and that it thought it had the right to do that. I said to Mr. Abernethy, when he asked me, What do you intend to do about this, and Mr.

Armstrong who was standing right there, and in Colonel Hughes' presence, and Mr. Leahy's, I said, Mr. Abernethy, if that's what you have come down here for, I can assure you that it is going to be given sound consideration by the Webster Motor Car Company. We will take the problem back. I will discuss it, I believe I said, with our board of directors. If not, I said, with my father and the company, and we will let you know our decision. [1362] I emphatically state that at that conference no representative of the Packard Motor Car Company made any offer to sign the agreement, made any offer in any statement that they were dealing with us in good faith, made no statement that there were assurances from them, from Abernethy, or Armstrong, that we could rely on them, absolutely not.

Q. Did Mr. Abernethy say to you, or in your presence, I am the assistant general sales manager and I can sign this renewal contract right now? A. Unequivocally, no, he did not say that.

Q. Did he say to you, You are vice president of the Webster Motor Car Company, why don't you go on and sign this agreement right now? A. Absolutely not.

Q. What was done with the form of proposed renewal agreement? A. The proposed renewal agreement that Mr. Beck had left—or that Mr. Porter had left with Mr. French on April 22, 1952, was turned over to Mr. Leahy and to Colonel Hughes by Mr. French, I believe.

Q. So that it was available for your signature and the signature of the factory representative at that time, wasn't it, on May 20th? A. I assume it was, Mr. Denit. It was not brought out.

Q. You know that, don't you? [1363] A. Beg pardon?

Q. You know that, don't you? A. No, I do not know that it was.

Q. These gentlemen from the factory and the zone office came in to discuss the renewal of the contract, didn't they? A. Absolutely not.

Q. Didn't they eventually get around to telling you that that was why they were there? A. Yes, they eventually got around to it.

Q. And they got around to it after you had finished discussing with them the Sherman Antitrust law and Packard's violation; is that correct? A. That is correct.

Q. After May 20, 1952, the renewal contract was again tendered to Webster, wasn't it?

* * *

A. No, I don't believe it was. A letter of June 4th reminded us that we had the contract and gave us until June 11th to return it signed to [1364] the zone office.

By Mr. Denit:

Q. Well, you saw and read the letter of June 4th, didn't you? A. Yes.

Q. You knew, didn't you, that that was Packard's tender of a renewal contract to Webster? A. As a lawyer it certainly does not to this day strike me as a new tender. It is a reminder that we had it.

Q. Didn't it indicate to you that Packard was willing to give Webster Motor Car Company a renewal until March 31, 1953? A. To answer that question I would have to assume that Packard would act with us in good faith during the year, and I have as yet seen nothing that would lead me to that conclusion.

Q. You understand my question. A. And I believe I have answered it.

Q. Didn't that indicate to you, as a reasonable person, that Packard was then willing to extend the Webster Motor

Car franchise until March 31, 1953? A. On the basis of what I know now, does that indicate to me that they intended to, Mr. Denit? Is that the question? I want to know if it is on the basis of what I now know.

[1365] Q. You read the letter, didn't you? A. Yes, and I understood the terms in the letter.

Q. It referred to the matter of renewing the Webster Motor Car franchise to March 31, 1953, didn't it? A. It did.

Q. And you had the form on which that would have been accomplished as a matter of writing, didn't you? A. If Packard signed it after we signed it then it would be a contract, yes.

Q. Didn't you understand when Packard was asking you to sign it that Packard was also willing to sign it? A. I certainly did not.

Q. What did you think they were doing? Just playing? A. I certainly do now and I did then think they were deceiving us, yes.

Q. Now, Mr. Webster, did you ever communicate to any representative of Packard that the Webster Motor Car Company would not under any circumstances accept a renewal of the franchise but desired to pursue a lawsuit against the Packard Motor Company? A. Never.

Q. You told us you were a member of the bar of the State of Maryland? A. That is correct.

Q. Did you appear in an action instituted in the [1366] United States District Court for the District of Maryland by the Webster Motor Car Company and Richard C. Webster, plaintiffs v. Zell Motor Car Company, and others, defendants, being Civil Action No. 8152 in said Court? A. I am not sure of the civil action number, but I appeared as attorney for Webster with Colonel Hughes and Mr. Leahy of counsel, that is correct.

Q. And that action was instituted on March 31, 1955, was it not? A. That is correct.

The Court: Mr. Denit, may I suggest this, that if for the purposes of the defense the records of that case become relevant you just offer them in evidence? I don't think you have to go through formal proof.

* * *

[1370] The Court: I would like to have counsel come to the bench.

(At the bench:)

* * *

[1372] Mr. Smith: The order in the Maryland action providing for dismissal upon the disposition of this action releases the alleged Maryland co-conspirators, the joint tort feasors, and our position in the sixth defense is that that constitutes a release of these defendants.

The Court: All that this order does is to stay the Maryland action. It doesn't dismiss it. It provides, however, further that after final disposition of the District of Columbia action the Maryland action shall be dismissed with prejudice. It isn't dismissed yet.

Mr. Smith: It provides for dismissal with prejudice upon any disposition of this action, even by settlement.

The Court: Exactly. In other words, all it says, that at some future time, when the District of Columbia action is disposed of, either by settlement or final judgment, [1373] we shall dismiss with prejudice the Maryland action.

Mr. Smith: It is automatic upon the disposition of this action. Since that order provides for dismissal with prejudice it in effect constitutes a release of the Maryland joint tort feasors, and it is no less a release because that dismissal with prejudice takes effect upon the disposition of this action, because the disposition of this action is inevitable, and the disposition of the Maryland action is inevitable and beyond the plaintiffs' control.

The Court: But Zell Motor Car Company is a party to the District of Columbia action.

Mr. Denit: It hasn't been served.

The Court: That is a different matter, but the point is they are named a party.

Mr. Denit: There couldn't be any judgment against them in this action.

The Court: Because they have not been served. In other words, let me see if I understand your line of argument, because before I pass upon it I want to be sure that I first understand it. If suit No. 1 is brought against defendants A and B, and then suit No. 2 is brought against defendant A alone, and the plaintiff procures an order in suit No. 1 staying suit No. 1 and providing that after the disposition of [1374] suit No. 2, suit No. 1 shall be dismissed, you construe that as an agreement to release the second defendant.

Mr. Smith: We construe it as in effect a release.

The Court: But that is a release to take effect in futuro, isn't it?

Mr. Smith: It is a release which automatically will take effect upon an event which is certain to happen, and it operates as a release of them. And

then under the rule that the release of one joint feasor releases others, we claim that we are released, and it will happen automatically upon the termination of this matter.

The Court: Suppose the tort claimant who has a claim against two joint tort feasors says to tort feasor B, if I recover against A I shall then release you, and signs a contract to that effect, that doesn't release A because it is a release to take effect in futuro.

Mr. Smith: I would say it would be a release.

The Court: Unless you have an authority to the contrary, I am going to rule otherwise.

Mr. Smith: We have authorities, Your Honor, in our points and authorities, in support of our motion to amend so as to add the sixth defense.

The Court: I granted your motion to amend for the reason I thought you had a right to present the defense. If I [1375] denied a motion to amend you couldn't secure a review of my ruling, and I thought it was only fair that you should be allowed to amend so that you could secure a ruling on the defense in case it was adverse to you and if the case should go higher then you would have an opportunity to assign my ruling as error, which you wouldn't have had an opportunity to do otherwise. I will read the points and authorities.

* * *

Mr. Smith: Your Honor, we wish to have the testimony of this witness to prove the point that I mentioned in our conference at the bench.

The Court: What is the point?

[1376] Mr. Smith: That they preferred a lawsuit to a renewal of the franchise.

The Court: I will let you do that, of course, but insofar as the question of release is concerned I shall accept no oral testimony because I have to determine that on the basis of the formal documents.

Mr. Smith: We don't intend to offer any testimony on the conclusion of law, but we do wish to ask this witness questions.

The Court: You can't do that about the record.

Mr. Smith: No, about the effect of the record.

The Court: Not about the contents of the records.

Mr. Smith: We should like to ask the witness about what he did there and things he said.

Mr. Leahy: They are all in the record, aren't they?

Mr. Smith: That doesn't make any difference. We are entitled to ask the witness about them.

The Court: What?

Mr. Smith: We want to ask the witness about the position he took, and the things he said. It is part of the point I explained to Your Honor.

The Court: But I will accept it only as bearing on that point, I want to notify counsel that I cannot accept it as [1377] bearing upon the construction of this order, because I have to construe it from what it says on its face.

Mr. Smith: We don't intend that, Your Honor.

The Court: I do want to make this suggestion to you, Mr. Smith. I am just wondering how strong your position is, because it appears from the undisputed testimony that subsequent to the time, or about the time, that they offered this renewal to Webster they agreed with Zell not to renew it again. That is in the evidence.

Mr. Smith: We do not believe that the evidence shows that they agreed with Zell not to renew it again.

The Court: Well, that was certainly Zell's construction, wasn't it?

Mr. Smith: I don't even concede that was Zell's construction.

The Court: That is the way I construe the evidence that Zell said, well, I am going to insist on your carrying out your commitment to make me the sole dealer; if you want it for a year, that's all right, but you have to make me sole dealer.

Mr. Smith: Does Your Honor consider the fact as conclusively established at this point?

The Court: Well, no fact is conclusively established unless there is a judgment of a Court, but so far it has not been contradicted.

[1378] Mr. Smith: May I respectfully suggest that the conclusion Your Honor expressed may have been a pre-judgment?

The Court: I have not expressed a conclusion, but I have expressed my construction of the evidence as it has progressed up to this point.

* * *

[1379] *By Mr. Denit*:

Q. Mr. Webster, you identified the action which Webster Motor Car Company and Richard C. Webster filed in Baltimore against Zell and Zell Motor Car Company and others as an action in which you appeared as attorney. A. That is correct, sir.

Q. And in that action was substantially the same claim asserted against Zell as is now asserted in this suit against Packard? A. Yes.

Q. You attended the pretrial sessions that were held in this case, did you not, in this court? A. Yes.

Q. And you were present at the last of the pretrial sessions when the Court signed the pretrial order? A. Yes.

Q. In connection with the Baltimore action there was a motion filed by the defendant in which the Court signed an order, is that correct? |1380| A. That is correct.

Q. And thereafter there was a motion filed on behalf of Webster Motor Car Company and Richard C. Webster to vacate and set aside that order, wasn't there? A. There was, yes.

Q. Did you appear upon the argument of that motion? A. I did.

Q. Was that on May 2, 1955? A. I believe it was, yes.

Q. Did you make the statement to the Court in that argument:

> "There is one motion in there to strike out of the midst of our complaint, and Packard has been arguing this for three years, that the portion of the complaint that Mr. Lewin wants you to jump in and strike out, should be stricken. We have successfully persuaded Judge Holtzoff on each instance that Packard has made that argument that this early period is not relevant, that it is relevant."?

A. Yes, I made that statement. But Lewin, I believe, rather than Levin. But that is correct, I made that statement.

Q. Didn't you know as a matter of fact that Judge Holtzoff had not made a ruling on that matter, but affirmatively stated that——

Mr. Leahy: I object.

[1381] The Court: I am going to sustain the objection on the ground that this is not relevant, what happened at the pretrial hearing is immaterial. However, I would like counsel to come to the bench.

(At the bench:)

The Court: I want that quotation again, Mr. Denit.

Mr. Denit: We have it here.

(Copy of quotation was handed to the Court.)

The Court: I am going to exclude this because I don't think it is relevant. I am sustaining the objection, but nevertheless I am surprised. Certainly Mr. Webster has incorrectly stated what happened at the pretrial before me, because I made no such ruling. I just attribute this to Mr. Webster's youth and inexperience.

Mr. Leahy: I don't know what it is. It is the first time I have seen it.

Mr. Hughes: I was not at the pretrial.

The Court: I know you weren't. But I can remember what rulings I made. As a matter of fact, I made no rulings at pretrial. Now, it may be that he refers to the fact that I allowed certain interrogatories.

Mr. Leahy: I think that is probably it.

The Court: That doesn't mean that I ruled that it is relevant.

[1382] Mr. Leahy: Oh, no.

The Court: I frequently allow interrogatories on the theory that it might turn out to be relevant.

The rule as to interrogatories contemplates that admissibility should be determined later on.

Mr. Leahy: That's in the rule.

The Court: Yes. So the fact that I allowed an interrogatory doesn't mean that I held the matter to be relevant. I held that it was germane to the issues, which is an entirely different thing.

Mr. Leahy: Yes.

The Court: In a way "germane" is a broader term than "relevancy." Now I am surprised and chagrined that such a statement should be made. Now, this gentlemen, demonstrates the desirability of something I always do. I do not permit any lawyer to quote what any other judge said unless it is down in writing.

Mr. Leahy: That is right.

The Court: I never permit an oral statement of what some other judge held or stated, because, as I have told other members of the bar time and time again, you may put a wrong emphasis on what a judge said in the next courtroom, and out of courtesy to Judge A I am not going to permit you to do that unless you have it down in writing. However, I [1383] don't think this is of grave importance. I don't believe in exaggerating the importance of trivialities.

* * *

[1385] Mr. Smith: Aren't we entitled to impeach the witness, the testimony of the witness, by attacking his credibility?

The Court: That isn't the point. I am trying to point out to you that this form of offer of proof

would not avail you. If you want to make an offer of proof that will avail you, it should be made in a different form as I have indicated. However, you may give that offer of proof to the reporter, and it may be copied in the record for whatever good it may do. But if you really want to make an offer of proof that will be of assistance to you, the thing to do is to ask a particular question of a witness, and then if there is objection and the objection is sustained, you may make an offer of proof by saying, We contend that if the witness would have been permitted to answer, his answer would have been so and so. That is the kind of offer of proof that is contemplated by the rule.

Mr. Smith: May we make that kind of offer of proof?

The Court: I beg your pardon?

[1386] Mr. Smith: May we make that kind of offer of proof, Your Honor?

The Court: You may. I want you to read the pending question.

The Reporter (Reading):—

"Q. But didn't you know, as a matter of fact, that Judge Holtzoff had not made a ruling on that matter, but affirmatively stated that——"

The Court: I sustain the objection. Now, you have a right to make an offer of proof as to that question.

Mr. Smith: Wasn't the question answered?

Mr. Denit: The question was asked, but not answered.

The Court: Was not answered. Now, you have a right to make an offer as to what answer you expected to elicit.

Mr. Denit: We offer to prove that he knew that Judge Holtzoff did not make that ruling, and that his contention to the judge in Baltimore was not true.

The Court: Very well. I think that offer of proof is in valid form and protects the record so far as you gentlemen are concerned.

Mr. Smith: That substantially is what I intended by my offer of proof.

* * *

[1387] Mr. Smith: Your Honor, I hope it is understood that we are offering this line of testimony for three purposes: To prove the allegations of the sixth defense in the answer.

The Court: I didn't catch that.

Mr. Smith: To prove the allegations of the sixth defense in the answer. Second, to show that the reason for Webster's refusal to accept our renewal of its Packard dealer sales agreement was not a belief that Packard's offer was made in bad faith, but was a desire to develop a gamble upon a lawsuit instead of continuing as a Packard dealer. And third, to impeach the testimony of Donald D. Webster, and to attack his credibility as a witness by showing bias, prejudice, and interest which greatly exceeds that to be inferred from his relationship to the plaintiffs.

The Court: My ruling is this: First, that the defense in the answer will be determined solely on the basis [1388] of the formal record of the Maryland court, and oral testimony is not admissible. As to your second ground, I will accept testimony, and I will admit evidence as to that, but I am exclud-

ing this specific question because this specific question is neither relevant nor competent. As to the question of attacking the credibility of the witness, I shall not permit that to be done because you called him as your own witness. To be sure, he is a hostile witness. You are not bound by his testimony. You have a right to cross examine him and ask leading leading questions and seek to contradict what he says. But you may not impeach his general cridibility.

Mr. Smith: Well, Your Honor, he testified with respect to the Washington conference that Mr. Abernethy did not give the assurance that they would treat the contract on renewal——

The Court: You have a right to contradict that. You have a right to cross examine him concerning it. But you are not permitted to cross examine him as to his general credibility because you have called him as your witness. There is a distinction between cross examining a hostile witness concerning the testimony that he is giving, on the one hand, and also contradicting him, and on the other hand, cross examining him as to his general credibility after he [1389] has given an answer that you don't like. That, you may not do.

Mr. Smith: We are not attempting to impeach him as to general credibility, but as to credibility with respect to the matters in this case, as to which he is so close, being the son of the plaintiff, and the attorney for the plaintiffs in another action.

The Court: That is general credibility.

Mr. Smith: In which he made these statements for the purpose we contend of saving this lawsuit from loss by release.

The Court: I have ruled, Mr. Smith. You may not cross examine him as to credibility because you have called him as your witness. You are under no obligation to call him. However, you are not bound by his testimony because he is a hostile witness, and you have a right to cross examine him not as to his credibility, but as to the specific matters concerning which you are interrogating him.

Mr. Smith: Now, Your Honor said that he would not permit any testimony in addition to the records with respect to our sixth defense. We believe that we should be entitled to offer testimony with respect to the sixth defense. Shall we wait until the question is asked, and then make our offer of proof, because we do feel that some of the——

The Court: Will you tell me briefly what kind of testimony you expect to offer?

[1390] Mr. Smith: Yes.

The Court: Without making a formal tender of proof, just tell me in a general way what you expect to offer.

Mr. Smith: Mr. Webster's statement which was read in the last question, made in the Maryland Court, was made in an endeavor to vacate a consent order providing for dismissal of the Maryland action with prejudice because he feared that the order would release defendants in the present action. In his motion to vacate Mr. Webster said, and then we quoted from the record——

The Court: I am going to exclude all that because I think I am bound by the face of the order. I have to determine the question from the face of the

order, and I may not consider transcript of argument of counsel.

Mr. Smith: I think that statements by an officer of the corporate plaintiff in this case in arguing facts would be admissible and also statements in that connection of counsel in this case—not res judicata; we are not talking about res judicata here; we are talking about release.

The Court: But this is the question: What is the legal effect of that order? And I think parol evidence of that issue is not admissible. I would have to determine the legal effect of that order from the face of the text of the order.

[1391] Mr. Smith: It seems to me in respect to relevancy it is relevant to the point we made before, that we are attempting to show that this plaintiff here preferred a lawsuit to renewal of its agreement, and all this is part of the picture.

The Court: No. It is my intention to exclude that. So far as the sixth defense is concerned, I shall not admit any parol evidence.

Mr. Smith: May it be understood, Your Honor, that the offer of proof that I have made here in our discussion goes to the whole line of questions that Mr. Denit may ask along this line, so that we don't have to repeat the offer of proof, if objection is sustained?

The Court: Of course; your rights are protected by the record as it stands.

(In open court:)

The Court: You may proceed.

By Mr. Denit:

* * *

[1392] Q. Do you know whether or not all of the documents that were furnished to you and your associate counsel with respect to the matters involved in this case had been furnished prior to February 26, 1954? A. I think some were furnished later, Mr. Denit.

* * *

[1393] Q. And you had all of the Beck letters from the zone directed to Abernethy when Mr. Beck was examined, didn't you? A. I can't tell you. Hundreds of documents were furnished by Mr. Barker after the date of February 26, 1954. If I might examine what we received after that date I could be more direct in my answer to you.

Q. Did you share the view which your father stated to Mr. Abernethy, I am writing you, Roy, to tell you that the part you played in the disenfranchisement of our company in [1394] Baltimore and its subsequent liquidation were due to those above you in the factory and that it was not due to your own free choice is our honest belief. A. I did not share that belief with my father. May I go on?

Q. Did you share the belief that the documents so far produced, that is produced as of February 26, 1954, bear this out? A. No, indeed. I think the documents produced prior to that date, Mr. Denit, definitely show that Mr. Abernethy, though he was acting under instructions from his superior, Mr. Briggs, played a very independent and important part in our disenfranchisement and the establishment of the Zell monopoly.

Q. Upon what do you base that? A. Well, I take the document first of, I believe it is March 21, 1952; it is a letter written by Mr. Zell to Mr. Leo Fenn, and forwarded

to Mr. Abernethy. It has in the upper right-hand corner, as you will remember, a notation by Mr. Abernethy that he had advised Mr. Beck to try to get Webster to sign a 7/1/52 cancellation amendment. If I may stop there, that would indicate and did indicate to me that Abernethy played an independent part in our disenfranchisement in trying to get us to sign an [1395] amendment which would terminate automatically three months later.

Q. That was in direct accord with what Beck testified your father agreed to do, wasn't it? A. No. Mr. Beck told us on his deposition that he picked the date 7/1/52 out of the air. Certainly not even Mr. Beck contended that my father had agreed to liquidate by July 1, 1952. Mr. Leahy asked Mr. Beck, he said, Where did you get this date 7/1/52? And Mr. Beck said, I just picked it out of the air.

Q. Well, it was at least Mr. Beck's statement and claim that your father had agreed to liquidate, and he was giving him a convenient time within which to do it, wasn't it? A. That was Mr. Beck's contention in part at the time of his deposition.

Q. And it was his contention on the 1st day of March, 1952, when you talked to him over the telephone, wasn't it? A. Substantially, yes.

Q. And it was his contention in the letter that he wrote to your father on February 14, 1952? A. That is correct.

Q. Well, now, you disagreed with your father then that Abernethy was not reponsible for his disenfranchisement. [1396] In what way do you feel that Beck was responsible for his disenfranchisement? A. Well, I feel that Beck was responsible because he came down to Salisbury on the 13th of February, 1952, and did not tell my father a single word about the meeting that he had had in the Waldorf-Astoria

on January 29th with Mr. Zell. He did not tell him a single word about the fact that on February 11, 1952 he had been advised by Mr. Abernethy that they had decided to go along with Zell's request to be the sole dealer, and to terminate the other two dealers. It appeared to me, Mr. Denit, that Marshall Beck's writing of the letter that he did on February 14, 1952, to my father, in which he said it was mutually agreed because of existing circumstances in your dealership that it would be in your best interest to liquidate the Webster Motor Car Company, and when Mr. Beck did not thereafter, when we wrote him on February 20th and on March 9th, when he did not point out any of these existing circumstances, and never until this suit was filed did we learn of the hotel meeting, of their agreement to eliminate us—no, I think Beck was a very responsible character in this, just as I do Abernethy.

Q. You knew Mr. Beck was acting under instructions from the home office in Detroit, didn't you? A. No, I did not know that when the letter of February [1397] 14th came to us. I had no idea until these documents were turned over, until we took these depositions of these men. We had no idea what the instructions were.

Q. Didn't you just finish telling us that you saw the notation on the letter that Abernethy had instructed Beck to try to get a July 1st termination? A. Absolutely. After this suit was filed that letter was turned over to us, and not before.

Q. Didn't that indicate to you that Mr. Beck was acting under instructions of the home office? A. I think now that Beck was acting under the instructions of the home office. I think he carried those instructions out, yes.

Q. And you don't really believe that Mr. Beck conspired with anybody to injure your father or your father's business

do you? A. Well, I certainly do, Mr. Denit. To destroy it, to be specific.

Q. To do what? A. Not just to injure the business, but to destroy it.

Q. You know perfectly well that your father had the opportunity to continue in business as a Packard dealer to March 31, 1953, don't you? A. I also know that before the time that——

Q. Do you know that? [1398] A. No, I do not know that. May I elaborate?

Q. I want an answer to my question. A. Well, I have answered, No, I don't know that.

Q. You read the proposed extension agreement, didn't you? A. I read the proposed extension agreement.

Q. And didn't that say on its face that his agreement was extended to March 31, 1953? A. That said that the agreement would be extended to March 31, 1953.

Q. And it was the same kind of an extension agreement that Webster Motor Company had gotten on the 31st day of March, 1947, the 31st day of March, 1948, the 31st day of March, 1949, and the 31st day of March, 1950; and March 31, 1951, wasn't it? A. That is correct—in its printed terms, it was.

* * *

[1399] Q. Mr. Webster, before your conversation with Mr. Beck on March 1, 1952, you had discussed with your father Beck's visit and his letter? A. That is correct.

Q. And did you and your father determine that if a satisfactory purchaser could be found for the Webster Motor Car Company as of March 1, 1952, your father would retire and the Webster Motor Car Company would retire from the Packard dealership? A. I think my father felt, after he received that letter of February 14th, that

it looked as though he wasn't going to get his franchise renewed; yes, I think my father was in such a state that he would have retired from the business under those conditions.

Q. And you agreed with him, did you not? A. I certainly did not. I thought Dad was knuckling down much too easy to that sort of thing.

Q. Did you then advise your father not to try to sell [1400] out? A. I definitely advised my father to fight this thing.

Q. And not to sell out? A. To fight this thing. There was no consideration of his selling this thing, as you refer to it.

Q. "This thing" has not occurred to me; I am talking about the business of the Webster Motor Car Company. A. That is what I am referring to, Mr. Denit.

Q. Did you advise your father when he wrote on March 20, 1952 that he would consider a sale provided he had a side contract to pay him $15,000 for his services in assisting the purchaser? A. I think you are referring to the letter of February 20, 1952, that my father wrote to Mr. Beck, and in which I assisted him.

Q. Well, whatever date it was, did you advise him with respect to that? A. I advised him not to say anything in that letter concerning what he would be willing to take for his business. He told me, Donald—should I go on?

Q. Did you advise him with respect to the sale? A. I advised him definitely not to put that in the letter, and he said, Donald, you don't know what this is like. I would rather have a quarter of a loaf than no loaf. Those were Father's words to me, and he then wrote them into the [1401] letter.

Q. Now, at that time, Mr. Webster, it is true, isn't it, that you had concluded to retire from the automobile business and pursue the practice of law? A. I can't say that entirely, Mr. Denit.

Q. Why not? A. I was devoting myself full time to the Government work that I was doing in the Department of Justice.

Q. Well, you—— A. May I finish?

Q. You certainly may. A. You asked me whether I had decided to retire from the automobile business. I definitely can't say that I had, and yet I was devoting much more of my time after January, 1952, to the law than I was to the automobile business.

Q. Well, weren't you even advertising yourself as a lawyer by your letterhead? A. I believe, Mr. Denit, that letterhead that you refer to showing 4410 York Road, Donald Webster, Attorney, was gotten up in 1950 when I had left Constable & Alexander, the firm I was with in Baltimore. I had a leave of absence from them and I went up to help my father after the fire, so that I was a lawyer at the Webster Motor Car Company in late 1949 through 1950, and through 1951, that is true.

Q. And then you accepted a permanent, full-time [1402] position in the Department of Justice as an attorney? A. That is correct.

Q. And you began work exactly on February 7, 1952, didn't you? A. That is correct.

* * *

THOMAS V. MALONEY was called as a witness by the defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Denit:

Q. Will you state your full name, residence and occupation? [1403] A. My name is Thomas V. Maloney.

The Court: I wish you would speak a little louder and a little more distinctly; there are a lot of people who have to hear you. How do you spell your name?

The Witness: M-a-l-o-n-e-y.

The Court: And your first name is what?

The Witness: Thomas V. Maloney. I live 7552 Montgomery Road, Cincinnati, Ohio. I am employed by the R. L. Polk & Company, as assistant manager of the Motor Statistics Division of the company, in charge of the production plant that produces the statistics.

By Mr. Denit:

Q. You said a word that most of us don't like to have to say too often, because we get all balled up. Does your work have to do with the gathering of information concerning the registration of automobiles? A. Yes, sir.

Q. And did you publish the information so gathered in any form? A. Yes, sir.

Q. And what is the form in which it is published? A. Well, we publish it in many forms, but I can describe it this way——

* * *

[1404] Q. What is the nature of the material which is gathered, and what use is made of it by automobile manu-

facturers? A. Well, we gather up in a monthly cycle the registrations of new vehicles with the respective motor vehicle departments all over the United States, Alaska, Hawaii, and Puerto Rico. We take these registrations and we compile them statistically by makes and then by city and by county and by states. Then we have a second series of reports whereby we break down these geographic reports that I have just described. And for the manufacturers, on their specifications, we assemble a second set of reports comprising the same statistics but setting it up according to the geographic setup of the individual company; that is, we set it up by their own dealers, market areas, regions, zones, districts, and so forth.

Q. To what extent, Mr. Maloney, is your service used by automobile manufacturers? A. Well, our customers encompass practically the entire automotive industry. I might mention some of them——

[1405] Q. We don't need the names of your customers. Does it serve the function in the automobile industry that Standard and Poors serve in the brokerage business? A. Well, I am not familiar with that report, sir. I don't know.

Q. Is it relied upon as an accurate market report showing registrations of automobiles all over the United States? A. I believe that it is, sir.

Q. And that of course would include the city of Baltimore? A. Yes, sir.

Q. And the information is broken down in accordance with makes of cars or price class, is it not? A. Well, in the second type of reports that I described, where we make them to the specification of the individual manufacturers, yes, they have us group the particular cars by what they term to be cars in the competitive price class. And then we analyze those statistics for them, seeking out the percen-

tages of penetration into the industry and the price class, or the Big 3, or whatever they desire.

Q. Was Packard Motor Car Company one of your customers in 1950, 1951, and 1952? A. Yes, sir, it was.

[1406] Q. And did you furnish that company the kind of service information that you have just described? A. Yes, we did, sir.

Q. In addition to the original records do you have any other sources from which you obtain this information? A. Yes, sir; yes, sir. There are vehicles that are sold to the city, county, state and Federal Government, and then to what we call off-highway users. The Federal Government does not register any of its vehicles that I know of with state governments. And since a moment ago I said that we get our material from the state motor vehicle departments, I should go a step further and say that those classifications of vehicles might not be registered with the state governments, such as the Federal Government, city, county and state vehicles, and then the off-highway users such as vehicles that are used on private roads or in the lumber industry country, such as Oregon, where they have hundreds of miles that are not state roads and they do not register the vehicles up there. Those vehicles are reported to us by the manufacturers.

* * *

Q. And you furnished your service to Packard in the [1407] years I indicated? A. Yes, sir.

* * *

Robert W. Russell—By Defendants—Direct

[1408] ROBERT W. RUSSELL was called as a witness by the defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Denit:

Q. State your full name, please, sir. A. Robert W. Russell.

Q. Where do you live? A. In Detroit, Michigan.

Q. What is your business or profession? A. I am manager of the Organization and Analysis Department, Packard Division, Studebaker-Packard Corporation.

Q. What are your duties in that department, Mr. Russell? A. Primarily dealer records and sales analysis.

Q. How long have you been engaged in that sort of work? A. With Packard I have been engaged in that type of work for a year and a half.

Q. Prior to that time were you engaged in the same sort of work? A. For a period of three years I was engaged in similar work with the Ford Motor Car Company.

[1409] Q. What sort of records are supplied to the Packard Motor Car Company by R. L. Polk Company? A. For a number of years Polk has supplied us with actual new car registrations by makes and by counties and by communities for each make of car in the industry.

Q. For what purpose are those records used? A. They show us what we do, and what our competition does, in order that we may determine how well we are penetrating each market.

Q. Do you know the extent to which, if any, those records are relied upon by the automotive industry? A. I know for both Ford Motor and Packard that they are considered the one and only reliable source that we use for such penetration analysis.

Q. Now, Mr. Russell, did you prepare a schedule indicating Packard's competitive performance in Packard's price class for the years 1950, 1951, 1952 and 1953? A. I did.

Q. From what source? A. R. L. Polk figures.

Q. Is this your product? A. That is.

Mr. Denit: We offer it in evidence, if the Court please. A copy has already been furnished to opposing counsel.

The Court: You have furnished a copy to the other [1410] side?

Mr. Denit: Yes.

The Court: It may be admitted.

The Deputy Clerk: Defendants' Exhibit No. 26.

* * *

Mr. Denit: We have four copies we might circulate among the jurors.

The Court: Let me see the original first. (Defendants' Exhibit No. 26 was handed to the Court.)

The Court: Yes, you may circulate copies among the jury.

Mr. Denit: There are four copies which may be shared by you ladies and gentlemen.

(Four copies of Exhibit 26 were handed to the jury.)

By Mr. Denit:

Q. Now, Mr. Russell, will you tell us, please, sir, what this schedule shows? A. First of all it shows for each year, each of those four years, Packard's total registration, both nationally and in Baltimore zone of influence. Secondly, it

shows registrations of other makes which we consider competitive with Packard. That is indicated as price class. [1411] The column on the right indicates Packard's share of that price class. In other words, it represents Packard's penetration in the price class for each of those four years.

* * *

Mr. Leahy: If Your Honor please, might I ask—I don't quite understand what this means, "Baltimore zone of influence" with the asterisk which directs us to "Baltimore City, Baltimore County and Howard County." We are not interested in those counties.

* * *

[1412] Mr. Denit: That was Webster's zone of influence as well as Zell's zone of influence.

By Mr. Denit:

Q. The last figure, Packard percentage of price class, what does that mean? A. Well, that indicates Packard's share of the total price class. In other words, it represents Packard's penetration for each of those years. In other words, in 1950, for example, in the United States, Packard's percentage of that price class figure was 4.56. In Baltimore's zone of influence it was 4.91. In other words, Baltimore did relatively better penetration-wise than Packard did in the whole United States.

The Court: Does that mean that, say, of all cars sold in the United States in that price class in 1950, there were 4.56 per cent Packards?

The Witness: That is right, sir.

[1413] *By Mr. Denit*:

Q. In 1951, 5.20 per cent; 1952, 8.27 per cent; 1953, 7.60 per cent. Is that correct? A. That's right, nationally.

Q. And in Baltimore's zone of influence in 1950 the percentage of price class was 4.91, is that correct? A. Right, sir.

Q. In 1951 it was 5.31? A. That's right.

Q. 1952, 7.98. And in 1953, 8.11? A. That's right.

The Court: Does that mean that except in 1952 Packard was doing a little better in the Baltimore area than the rest of the United States?

The Witness: That is right, sir. That is what these index figures at the bottom are intended to indicate. Showing that from 1950 through 1952, Packard was going downhill in the Baltimore zone of influence.

The Court: But in 1950 and 1951 it was still better than it was in the rest of the country, isn't that so?

The Witness: That is right.

The Court: And it went down below the rest of the country in '52 and came up above the rest of the country in '53, is that correct?

The Witness: That's right.

[1414] *By Mr. Denit:*

Q. Now, your next classification is "Ratio of Baltimore to United States in Packard percentage of price class." Will you explain that?

The Court: I thought he just explained that.

Mr. Denit: Baltimore.

The Witness: Yes.

By Mr. Denit:

Q. The net result of this schedule is to show that in 1953 Packard had its greatest percentage of price class in the four year period, is that correct?

Mr. Leahy: Oh, no. It shows distinctly in 1950 it was 108.

The Witness: 1953 we returned to the level we had enjoyed in 1950, but from 1950 through '52 the trend was downward. And through some action presumably taken in '52 or '53, we were able to reverse that trend back to a level essentially the same as 1950.

Cross-Examination by Mr. Leahy:

Q. I have only this one question: Is that the only one we have been talking about? A. That's right.

Q. As I understand this, it is supposed to be a chart of Packard's competitive performance in Packard's price class? [1415] A. That is right, sir.

Q. Now, when you get to—let's take the United States. Does that mean that in 1950 there were 73,000 Packards sold in the United States? A. Yes, as reported by R. L. Polk.

Q. As reported by R. L. Polk? A. That is right.

Q. And in price class, that means that all of your competitors within the price range and class sold a million six hundred fifty thousand eighty two, is that right? A. That is right.

Q. Do you know what cars are included in that? A. Well, I have copies of the Polk sheets which indicate that. Generally, I could name them for you.

Q. Go ahead. Would you, please? A. Packard, Cadillac, Lincoln, Chrysler V-8, Nash Ambassador, Hudson Hornet; cars in that class.

Q. Now, all of those cars put together amounted to the total we have here, 1,650,082; is that right? A. That is right.

Q. Then you divided, of course, the Packards into that total and you got 4.54? A. That is Packard's per cent of that total; that's right.

Q. Packard's per cent of that total. [1416] And that's all you were asked to do, wasn't it, to determine percentages? A. That is right.

Q. And you were allowed to pick the cars which you considered to be in the price class? A. No. Actually the picking of these cars in the price class was done prior to my being there. However, since I have been there its been done essentially the same way, in that we prepare, based upon analysis of competition price and specifications, which makes should be in that price class, and then the sales manager and general sales manager make the final decision as to what cars should be finally included in the price class.

Q. I notice in 1951 Packard sold almost 67,000. A. That's right.

Q. Isn't that right? A. That is right.

Q. And your competitors dropped from 605,082 to 278,288. They drop down from the one million six to a million two, or they lost approximately 400,000 cars, or didn't they, or 300,000? A. 300,000, that's right.

Q. And Packard was losing only 6,000? A. Let me point out one thing, that there is no definite consistency in the makes of cars included in the [1417] price class. That can change from year to year depending upon what makes should be in the price class. In other words, if a car is lowered in price and drops out of the price class, it is dropped completely. So this change that you are talking about may be due not to a loss in sales of the cars in the price class in 1950, but could be due to elimination of some of those cars from the price class.

Q. You prepared this, didn't you? A. I did.

Q. What was it due to? A. Well, I would have to check the original sheets and show which it was due to.

Q. Didn't you check that before you made up this? A. The important thing is——

Q. Well, answer the question, please. A. We made an analysis of that, but I cannot tell you right offhand which cars were eliminated.

Q. Well, you noticed, of course, when you made up this, and you knew you made it up for a court, didn't you? A. That's right.

Q. You knew you made it up for this case, didn't you? A. I was making it up as evidence for the attorneys to look at. I did not know it would be used definitely in any case.

Q. You didn't know it might be used in this case? [1418] A. I recognized the possibility, that's right.

Q. You know you did, don't you? A. I say, I recognized that it might be.

Q. Didn't you have enough interest in knowing what it was that controlled the unusual drop of cars in price class competition between '50 and '51 so that you could tell us whether you, Packard, deliberately dropped some makes of cars out of your price class category, or whether the cars that were in that price class category didn't sell as well in '51 as they did in '50? A. I didn't for a very good reason, that we are interested in Baltimore more relative to the United States. And as long as we use the same formula in analyzing the Baltimore market as we do the United States market, that factor is of secondary importance.

Q. Who told you to make the United States as one of the factors in this particular—— A. I don't know that I had been told. It is a base. It is an over-all average. If you want to compare anything, you have to compare it with an average or base.

Q. Whether you had been told or not. Were you told? A. I do not remember.

* * *

[1419] Q. Mr. Russell, do you know what it was that caused the drop in price class from 1,289,288 to 802,636 in 1952, 1951 and '52? A. Not definitely. It is probably a combination of both the change in content of the price class and lesser sales of makes in the price class.

Q. Who changes the content? A. My predecessors made recommendations, and those were approved or disapproved by the general sales manager.

Q. And your predecessors would be predecessors at Packard in Detroit? A. That is right.

Q. In other words, Detroit picks its own price class with which it wants to compete? A. It makes a final determination of which makes it is competing with, but it is pretty well determined by analysis of competition as to which you are competing with.

Q. Now take 1952, '53, what built back the price class from 802,636 in '52 to 935,172 in 1953? A. I am quite sure it is due primarily to increase of sales and the makes in the price class.

Q. You know what makes were increased in sales? A. I could check the figures and tell you.

Q. But you don't have the information now? [1420] A. I have it in my brief case.

Q. Will it take you long? A. To tell you which makes increased?

Q. Yes. A. No, sir. From '52 to '53?

Q. Yes. A. Cadillac increased from 87,806 to 98,612. Lincoln increased from 29,110 to 39,169. Chrysler V-8 increased from 67,814 to 79,230. Buick 70 increased from

47,541 to 72,742. DeSoto V-8 increased from 46,536 to 80,862.

Q. To 80? A. To 80,862, that's right. Olds 98 increased from 74,874 to 91,300.

Q. Did you have Hudson? A. Hudson fell off from 73,711 to 49,466.

Q. Was that still in the category of your price class, Hudson? A. In which year?

Q. In '53? A. In '53, yes. Hudson was.

Q. Do you have the categories before you now in the years from '50 to '53, inclusive? A. I do.

Q. Would you just look at them quickly and see if [1421] your price class categories changed in content in any one of those years? A. I am sure they did, but I have to make a complete tabulation of all makes to check off to see what changes were made.

Q. Don't bother about that. Let's get down to the Baltimore zone of influence. Now as I understand this last column over at your right it shows the Packard percentage of price class, is that right? A. That's right.

Q. What you really do is to divide the Packards sold into the total of other cars which you construe to be in the price class category, isn't that right? A. The reverse of that.

Q. Turn it backwards? A. That's right.

Q. All right. Now let's go to the Baltimore zone of influence. In 1950 that means you sold 537 Packards, isn't that right? A. 537 Packards were registered in the Baltimore zone of influence.

Q. That doesn't mean they were sold in the Baltimore zone of influence? A. That is correct, that is right.

[1422] Q. For instance——

The Court: Do you mean 537 new cars——

The Witness: Were registered in the Baltimore zone of influence.

The Court: You just said registered. Of course some of the cars registered are not necessarily new cars.

The Witness: These would be just new cars, sir.

By Mr. Leahy:

Q. All right. They are new cars, but you can't tell where the cars were bought, can you? A. That's right.

Q. For instance, some of the 537 might have been bought in Washington or Richmond or Chicago or Detroit? A. That's right.

Q. Just so far as the Baltimore zone is concerned you just show registration? A. Our penetration of the Baltimore zone of influence, that's right.

Q. Now wait a minute. Never mind this penetration. You have 537 registrations, haven't you? A. That's right.

Q. But you don't know whether the 537 registrations were sold by the dealers in the Baltimore zone of influence, do you? A. Registrations are not an indication of who sells [1423] cars.

The Court: May I interrupt you here? I would like to ask the witness a question.

Mr. Leahy: Yes, Your Honor.

The Court: Why don't you measure penetration by sales in a particular zone rather than by the number of owners of a particular make in a particular zone?

The Witness: This is a measure of the people in an area, what they buy, new cars they buy.

The Court: Well, I thought you just said that this isn't what the people in that area buy.

The Witness: Oh, yes.

The Court: Because some of those cars might have been brought from other places and vice versa. Some people in Baltimore might have moved and registered their cars elsewhere. Isn't that so?

The Witness: If they live in the area, sir, and buy them anywhere, and still have them registered in the area they are living in.

The Court: That is what you call penetration, not the number of sales in the area, but the number of people who have a particular make in the area?

The Witness: No, the number in the area who buy a new car, regardless of where they bought it. Of all their price class we made an analysis of our share.

[1424] The Court: Some of those people might have just recently moved into Baltimore after they bought their cars, isn't that so?

The Witness: No, it would be registered, sir, wherever their home address would be.

The Court: I see.

By Mr. Leahy:

Q. But in all events no matter what your registration shows, they don't give us any indication of the source of purchase? A. No.

Q. All right. A. Registrations do not.

Q. Now then the price class in 1950 showed 10,942 cars. A. That's right.

Q. And your price class percentage was 4.91. Now the cars in your price class competitively dropped from

10,000 to 8,000 or 2,200 cars and Packard dropped to 466 in '51 isn't that right? A. That's right.

Q. And yet although Packard registrations dropped, your percentage of price class went up, didn't it? A. That's right.

Q. Because you are comparing it with a drop in a [1425] competitive makes of cars in the category you call price class? A. That's right. Penetration increased in Baltimore.

Q. So that when you come to 1952 we have a price class jump in percentage from 5.31 to 7.98, don't we? A. That's right.

Q. That's 2.67, isn't it? A. Yes, in that area.

Q. In that area. And how many cars made that jump? A. Nine.

Q. Nine cars can shove you up 2.67? A. If the rest of your competition does not increase.

Q. When you get to 1953, you had 522 registrations, didn't you? A. That's right.

Q. And that made a difference of approximately 47 cars, didn't it? A. That's right.

Q. What? A. That's right.

Q. And you went up only thirteen-hundredths of a point then, didn't you? A. That's right.

Q. I see. [1426] Now if we take 1950, the registrations in the Baltimore zone of influence which include not merely Baltimore City but also Baltimore County and Howard County, for the four years that you have charted registrations, Packard never equalled in the number of registrations the number that you found for 1950, did it? A. I am sorry, I missed your point.

Q. In 1950 in the Baltimore zone of influence, you found 537 new Packards registered, isn't that right? A. That's right.

Q. And in '51, it was 466? A. That is right.

* * *

[1427] Q. And in 1951 it was 466, isn't that right? A. Yes, sir.

Q. And then in '52 it was 475? A. That's right.

Q. And in '53 522? A. That's right.

Q. Now, how long did you say you had been with Packard in this position? A. A year and a half, sir.

Q. A year and a half? You weren't there on March 26, 1953, were you? A. No, I was not, sir.

Q. Did you find the dealers complaining about the accuracy of Polk's reports? A. I cannot recall any incident where dealers complained about the Polk reports.

Q. Did you examine, when you were preparing this particular schedule, any other trade associations, to check one against the other, or did you just take Polk's? A. Polk is considered the authority. We have no reason to check against any other service.

Q. Did you ever hear of the Maryland Trade Association? A. I have heard of them.

Q. Do they do a similar service for automobiles within [1428] the State of Maryland? A. I believe they compile figures, but who uses them and how extensive they are used, I have never seen one of their reports, and I know no more than that about them.

Q. Well, when Polk's records are examined, analyzed, and classified, as you have them here, you take the statistics of Polk to be accurate and assume them to be accurate? A. That is correct.

* * *

Redirect Examination by Mr. Denit:

Q. Do you know whether other automobile manufacturers do the same thing? A. I am sure they do, sir.

Q. Is the method you have used for determining competitive performance in Packard price the same method used by other manufacturers in determining competitive performance in their price class? A. Not all of them use a price class concept. Some of them use a total industry, but the Ford, they use the Ford-Chevrolet to compare their total against, so a similar procedure was used by Ford. I do not know what basis Chrysler uses. I presume it to be essentially the same.

Q. Do you have the charts furnished you by R. L. Polk [1429] Company before you? A. Those covering the Baltimore zone of influence for the four-year period, that is right.

The Court: Isn't that a little far afield, Mr. Denit?

Mr. Denit: This is the original information, Your Honor, upon which he tabulated his schedule.

The Court: Yes?

Mr. Denit: And I thought I would offer it in evidence in support of his schedule.

The Court: Those are the working papers?

Mr. Denit: Those are the papers furnished him by Polk from which he made the computation.

Mr. Leahy: Oh, I make no question about it; I am willing to take Mr. Russell's word about the accuracy of his computation. I do not care to question it.

Mr. Denit: We will offer them, but of course I will not read them because that would serve no purpose.

The Court: All right.

The Deputy Clerk: Defendants' Exhibits 27-A, 27-B, 27-C and 27-D.

* * *

[1430] *By Mr. Denit*:

Q. Did you furnish to Mr. Miller a list of Packard dealers, other than Zell and Webster, with addresses in the city of Baltimore, Baltimore and Howard Counties? A. I am afraid you will have to ask the question again, sir. This list I checked to make sure that the dealers were in business on the dates shown.

Q. And did you give that list to Mr. Miller, an auditor for the Packard Motor Company? A. That is right.

[1431] Mr. Denit: I ask that this be marked for identification.

The Court: Let it be marked for identification.

The Deputy Clerk: Defendants' Exhibit No. 28 for identification.

* * *

Q. And this list is a list of Packard dealers in the area that it purports to represent; is that correct? A. Those dealers, sir, were in business at the time of the sales so indicated.

* * *

Recross-Examination by Mr. Leahy:

Q. From where did you get this information? A. That was forwarded to me by our attorneys, sir.

Q. Am I looking at the same thing you are looking at? What did you mean, some attorneys? The Packard [1432] attorneys sent on a mass of data to you to classify, is that it? A. Merely to insure that the dealers shown in there were Packard dealers in business at the time of sale.

Q. Well, now, what does the column—have you got that before you? I am pointing to the second column. Does that indicate the report number? A. I did not make the tabulation, sir.

Q. You don't know what it means, then, do you?

The Court: This hasn't been offered in evidence, Mr. Leahy.

By Mr. Leahy:

Q. What did you do, just check to see if the names of the dealers appearing hereon were Packard dealers at the dates indicated in the extreme left-hand column? A. That is right, sir.

Q. Did you find out throughout the period what type dealers they were, whether they were direct dealers from the factory, or were they dealers under anyone else?

The Court: Just answer yes or no.

A. I did not.

By Mr. Leahy:

Q. Did you check as to whether or not any of the dealers whose names appear on this chart paid any override to anybody? [1433] A. No, I did not.

* * *

[1456] FRANCIS L. ARMSTRONG was called as a witness by the defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Denit:

Q. State your full name, please. A. Francis L. Armstrong.

* * *

[1457] Q. Where do you live? A. Grosse Point Park, Michigan.

Q. How old are you, Mr. Armstrong? A. Fifty years.

Q. In what business are you engaged? A. I am assistant to the general sales manager, Packard Division, Studebaker-Packard Corporation.

Q. How long have you been connected with the automobile industry? A. Since 1929.

Q. What has been your experience in the industry? A. My first experience in 1929 was a personal representative for Lucius Manning and E. L. Cord, of the Cord Corporation, Auburn Automobile, and the associated company. Subsequently I was a truck manufacturer with the Thorne——

> The Court: You will have to speak a little slower, a little louder, and a little more distinctly. You are in a big court room and everyone has to hear you, and everything you say has to be recorded.

A. (Continuing) I was in the truck manufacturing [1458] business in Chicago, Illinois, with the Thorne family and the Swift Estate, manufacturing trucks. Subsequently I was in the axle and transmission manufacturing business in Michigan.

> The Court: I don't think we need the witness' life history. You are not qualifying him as an expert, are you?
>
> Mr. Denit: Partially, yes, sir.
>
> The Court: Is he going to give expert testimony?
>
> Mr. Denit: He probably will, yes, sir.
>
> The Court: Beg pardon?

Mr. Denit: Yes, he probably will.
The Witness: May I continue?
The Court: You may proceed.

A. (Continuing) In the axle and transmission business for Ford and Chevrolet trucks in Detroit, Michigan. I was a management adviser for various companies in the automobile manufacturing business until I went to work for Packard Motor Company in 1941, in December. With the Packard Motor Corporation, Car Division, I was assistant to the general sales manager, and the vice president of sales, under three or four different vice presidents of sales. I became assistant sales manager, assistant to the president, and I am now in the position I originally stated.

By Mr. Denit:

[1459] Q. And you have been with the Packard organization for approximately 15 years? A. Since 1941, in December.

Q. What was your position in 1950? A. In 1950 I was assistant to the general sales manager in charge of policy procedures and methods.

Q. And in 1952? A. Approximately the same position. I held a number of titles, Mr. Denit, during that period.

Q. Mr. Armstrong, were there meetings held by the sales divisions from time to time, in Detroit? A. Do you refer to staff meetings?

Q. Yes, sir. A. Yes. They were held approximately once a week.

Q. Were minutes kept of the meetings? A. I was secretary of those meetings.

* * *

[1460] Q. I will show you what has been marked as Defendants' Exhibit No. 29, being minutes of sales division meeting held January 7, 1952. Who were present at that meeting?

The Court: Just a moment. Don't the minutes record who were present?

Mr. Denit: Yes, sir.

The Court: Well, then the document speaks for itself. Don't let's consume time in having the witness read [1461] it.

Mr. Denit: Your Honor, we have read from time, and had witnesses to read from documents that were in evidence. I simply want to bring out by this witness that Mr. Abernethy was present at that meeting.

The Court: Then let's have that direct question.

By Mr. Denit:

Q. Was Mr. Abernethy present at that meeting? A. Mr. Abernethy was chairman of the meeting.

Q. Was the matter of the Webster Motor Car Company discussed at that meeting? A. Yes, sir.

Q. And do you know in general what the discussion was with respect to that company? A. The discussion was with Mr. Platfoot——

The Court: You will have to speak louder so that we can all hear you, sir.

The Witness: I am sorry. There was a discussion with regard to the Webster Motor Car Company and the deficiencies that had been reported by the business management department at Washington.

[1462] Q. Was there any discussion with respect to field representative reports that had been made concerning Webster Motor Car Company? A. The discussion was primarily with Mr. Platfoot who had been the Eastern sales manager at the time of the meeting, just transferred to be the Western sales manager. And Mr. Platfoot discussed, among others that were discussed, at the meeting, the deficiencies of the Webster Motor Car Company in Baltimore which had been mentioned in the business management report given Mr. Schroeder, and which was brought to the meeting by Mr. Schroeder. And as I recall——

The Court: You have answered the question. You are going far beyond the question.

By Mr. Denit:

Q. Was Mr. Schroeder also present at the meeting? A. Yes, sir.

Q. Had Mr. Schroeder made a report, or rather had there been a report received by Mr. Schroeder from Mr. Marnocha with reference to the Baltimore dealership situation? A. Yes, sir.

* * *

Q. I show you what has been received in evidence as [1463] Defendants' Exhibit No. 16. Was that report before the staff meeting? A. It was.

Q. Then after the staff meeting did you have any conferences with Mr. Beck, with Mr. Briggs, and Mr. Abernethy with respect to a conference they had held in New York with Mr. Zell and others? A. Several.

Q. Were you requested to make any study of the Baltimore dealer situation? A. The material with regard to the Baltimore dealer situation was all in our file and available.

I wasn't requested individually to make a study of it. The discussions were held between Mr. Briggs and Mr. Abernethy, myself, and other members of the staff.

Q. Did Mr. Briggs confer with you as to what kind of a decision should be made on Mr. Zell's request to be sole dealer in Baltimore? A. Yes, sir.

Q. Will you indicate what you suggested to him, and the factors that you discussed in connection with making the determination on that request? A. We were faced, in our opinion, with a decision as to whether or not we were going to keep Mr. Zell or Mr. Webster as the sole dealer in Baltimore. The problem had been posed [1464] by the fact that Mr. Zell had informed Mr. Briggs and Mr. Abernethy that he couldn't operate his business in Baltimore unless he were the only dealer in Baltimore, which posed to us a management problem of deciding whether to let the contract of the Webster Motor Car Company expire, leaving Zell as the only dealer in Baltimore, or to continue the contract of the Webster Motor Car Company with the result that Zell would quit. We believed that Zell would quit. So it was, I think, Mr. Denit, Hobson's choice so far as we were concerned. There wasn't a great deal of doubt. There wasn't any doubt really in our minds as to what our selection would be between the two dealers because of the relative size of the dealers. The Webster Motor Car Company was a suburban dealer. The Zell Motor Car Company was the downtown dealer, very much larger than the Webster Motor Car Company, selling considerably more cars, and with a far greater capacity. If we were going to be left with only one dealer in Baltimore, as the circumstances indicated we would be, we naturally wanted the dealer who would come closest to being the dealer who would handle the Baltimore territory and get us the neces-

sary penetration. That was the situation we had to deal with. The answer to us was obvious, that the best choice was the Zell Motor Car Company, who had been in Baltimore doing a volume job for a long period of time.

[1465] Q. Did you indicate those facts to Mr. Briggs as factors you thought should be taken into consideration in reaching a decision? A. That was my opinion, and the consensus.

Q. Did you have anything to do with carrying out the decision? A. No, I think Mr. Abernethy transmitted to Mr. Beck the—the zone——

The Court: No. Just answer yes or no. Just answer questions and then stop.

The Witness: No.

By Mr. Denit:

Q. Did Mr. Briggs tell you what his decision was upon the Zell request? A. Yes.

Q. After that decision was made, was the matter of the Webster Motor Car Company relations with Packard again brought to your attention? A. It next came to my attention when we received a copy of a letter that had been written by Marshall Beck to Mr. Webster, a letter of transmittal to us of a copy of the letter, a copy of a letter that Mr. Webster had written to Mr. Beck, and a copy of a report, I believe it was, by Mr. Porter concerning a meeting that they had at Salisbury, Maryland. [1466] The two letters did not agree. The letter from Mr. Beck to Mr. Webster indicated that Mr. Webster had——

The Court: No, you are going beyond the question. You have answered the question.

By Mr. Denit:

Q. As a result of receiving Mr. Beck's communication and the documents enclosed with it, were you called upon to do anything? A. Yes. It was turned over to me because it was a disagreement between the zone office and the dealer that was apparent on the face of the letters. It was turned over to me to discuss it with counsel.

Q. Did you read and consider the letter from Beck to Webster dated February 14, 1952? A. Yes, sir.

Q. What did you do after having read and considered that letter? A. I took the letter to Mr. Henry Bogle, general counsel for the Packard Motor Car Company.

* * *

Q. Why did you take the letter to Mr. Henry Bogle? [1467] A. Because I believed on reading the letter which had been written by Mr. Beck, that Mr. Beck had committed us to offer Mr. Webster another year's sales agreement. I took it to Mr. Bogle to see whether or not Mr. Bogle confirmed that opinion.

Q. Upon what did you conclude that there had been an offer for another year's sales agreement? A. Well, I can't remember the wording, Mr. Denit, without reading the document, but the wording to the effect that he gave him until July 1 to liquidate his business. It stated words to the effect that, Your contract will terminate as of that date. We did not have any contracts terminating as of July 1. Our contracts terminated as of March 31st. It appeared to me that he had committed us to give them another one year agreement inasmuch as we didn't have any agreements expiring July 1.

Q. Is that the reason why you conferred with counsel about the letter? A. That's the reason why I conferred with counsel.

Q. And after the conference with counsel, what did you do? A. After the conference with counsel, we talked it over in the office. Counsel had advised us that in his opinion it obligated us to offer them another one year agreement. We talked the thing over in the office and came to the [1468] conclusion that our original intention of letting the contract terminate on March 31st was no longer possible. Therefore, we got in touch with Marshall Beck at Washington on the telephone and discussed it with him and got his version of it. We asked Mr. Beck why he wrote that type of letter, because he had no authority to make non-standard agreements of any shape, nature and description. As a matter of fact, we were considerably sharp with him. Mr. Abernethy and I, both. And we asked Mr. Beck why he had written the letter, and Mr. Beck tried to explain that he was trying to be nice to Mr. Webster. Subsequently—we had asked—I don't know how far to continue that question.

* * *

Q. I understood you were telling us what you did after you conferred with counsel? A. Well, all right. We discussed the thing and decided that—or we talked with Marshall Beck on the telephone and told him that we thought he had been extremely in error in doing this. He tried to explain——

Mr. Leahy: I object to him going on.

The Court: You are repeating what you said before.

Mr. Denit: I don't want him to restate what he [1469] has already stated.

By Mr. Denit:

Q. You told us you communicated to Mr. Beck. What did you direct Mr. Beck to do, if anything? A. Well, at that moment we didn't direct Mr. Beck to do anything. We sent Mr. Fenn down to see Mr. Beck and over to see Mr. Zell, to find out whether Mr. Beck had made any kind of a commitment or agreement with Mr. Zell. We did that to get all our facts before we decided where to go from that point.

Q. What did Mr. Fenn report with reference to his visit with Mr. Zell? A. Mr. Fenn took Mr. Beck with him, although we hadn't told him to. We wanted to find out independently from Mr. Fenn what promises or agreements or understandings of any kind might have been reached between Mr. Beck and Mr. Zell contrary to any policy of ours, and the reason we sent him was because we were disturbed by the way he had mishandled the Webster matter.

[1470] Q. You say "he"; you mean Mr. Beck? A. Mr. Beck—had mishandled the Webster matter.

Q. What did Mr. Fenn report?

Mr. Leary: I object. It is purely hearsay, if Your Honor please.

The Court: Well, I am going to overrule the objection, but if you gentlemen will come to the bench I will explain the limitation on my ruling.

(At the bench:)

The Court: While standing separate and apart from anything else it is hearsay, but we have had a great deal of hearsay as to what transpired at these conferences, and I don't think it would be fair for me at this late stage to disallow one question;

besides which there is another matter here: My understanding of the Sherman Act is that ever since the decisions of the Supreme Court in the Standard Oil Company and the tobacco case of many years ago, it isn't every restraint of trade but only unreasonable restraint of trade that is banned by the anti-trust statute. Now, this testimony may possibly have a bearing on reasonableness. In other words, were these people acting reasonably or were they conspiring, and so on? I am going to overrule the objection.

(In open court:)

* * *

[1471] A. Mr. Fenn reported that there had been no agreement that he could determine, or understanding, of any kind, between Marshall Beck and Mr. Zell, which was the question we had sent him down to answer for us.

By Mr. Denit:

Q. Now, after receiving Mr. Fenn's report, what did you do, if anything, in connection with the Baltimore dealership situation? A. Well, we instructed Mr. Beck to extend on termination of the Webster agreement on March 31st, to extend a full one-year agreement. Do you want me to continue?

Q. Did Mr. Beck say anything with respect to that? A. Well, Mr. Beck demurred at extending the one-year agreement because he said he was quite certain that Richard Webster had intended to proceed as outlined in his original letter, with the expiration of his Packard dealer sales agreement, and he was quite sure that Mr. Richard Webster would sign a sales agreement terminating July 1st. [1472]

We were opposed to that because it was a non-standard termination date, but Mr. Beck was very insistent that in his opinion Mr. Richard Webster would be amenable to signing that type of an agreement. So because of the zone manager's insistence we told him he could go ahead and try to get the agreement if he thought that would be satisfactory to Mr. Webster, but that if Mr. Webster did not sign such an agreement to give him a standard one-year agreement.

Q. Do you recall approximately when this was? A. Well, it was in—well, I can't fix the exact date, Mr. Denit, but it was not long after Leo Fenn came back from Baltimore.

Q. Was it approximately the early part of April that these directions were given to Mr. Beck? A. About that, yes.

Q. Mr. Armstrong, I show you what has been marked as Plaintiffs' Exhibit No. 37, and I will ask you to look at it, and particularly the notations that appear in longhand on the right-hand side of the first page of that letter (handing document to the witness). Does that refresh your recollection as to when Beck was authorized to do the thing you have just told us about? A. This would indicate it, that it was about the 1st [1473] of April. It might, however, have been a few days prior to that.

Q. Now, did Mr. Beck report thereafter that he had offered a July 1st contract to Webster Motor Car Company? A. Yes, Mr. Beck did. He reported that he had talked to Mr. Richard Webster at Deal Island.

Q. With what result? A. With no result. As I recall it, he said that Dick Webster wanted to talk to his son Donald.

Q. But the renewal of July 1, 1952, was never in fact signed, was it? A. No, sir.

Q. At any time thereafter did you have anything to do with the Baltimore dealership situation? A. Well, several events. The agreement expiring July 1st was not signed and not returned for a period of time, a period of several weeks. We then instructed Beck to offer the standard one-year agreement. Beck reported shortly thereafter that he had sent his district manager down to present an agreement to Mr. French, at Baltimore. We inquired the circumstances of what happened when he took the thing down, and we found that he had [1474] submitted a blank agreement, to which Mr. French objected, and also that he had failed to leave the agreement. We again told Mr. Beck that——

> The Court: Gentlemen, now I made a ruling overruling an objection to hearsay statements for the reason I indicated at the bench, but my ruling doesn't go as far as to admit a statement of what the witness found. That goes beyond my ruling.
>
> Mr. Denit: May we have the pending question read?
>
> The Court: You may read the pending question. If the other side makes a motion to strike, I will certainly grant the motion.
>
> Mr. Leahy: I move to strike the answer, if Your Honor please. I don't think it is responsive, or material, and it is nothing but hearsay.
>
> The Court: I will strike so much of the answer as purports to relate what the witness found.

By Mr. Denit:

Q. After the July 1st contract was not accepted by Webster Motor Car Company, what did you do with respect to the Baltimore dealer situation? A. We instructed Beck to offer a one-year agreement.

Q. Was that ever accepted by the Webster Company? A. No, sir.

Q. Do you know whether it was in fact offered to [1475] Webster Motor Car Company? A. Mr. Beck reported that it was offered to the Webster Motor Car Company.

The Court: Well, there has been plenty of testimony on that, Mr. Denit.

By Mr. Denit:

Q. Now, in the month of May, 1952, did you come to Washington and confer with any persons representing Webster Motor Car Company? A. Yes; Donald Webster and his counsel.

Q. And were you accompanied by anyone? A. Mr. Roy Abernethy and I came to Washington.

Q. Mr. Armstrong, will you tell us exactly what took place at the conference, so far as you recollect it? A. Yes. Mr. Abernethy and I, accompanied by the zone manager, and the district manager, went into the law offices of Mr. Leahy. We were met at the elevator by Donald Webster, and shortly introduced, I believe, to both Mr. Leahy and Colonel Hughes. We went into an office in the corner of the building, and Donald Webster started the discussion by asking Mr. Abernethy and me which one of us was an attorney. We told him that neither one of us was an attorney.

Q. Will you keep your voice up a little bit? [1476] A. We told him that neither of us was an attorney. Donald Webster was disturbed to find that neither one of us was an attorney, and wanted to know why attorneys hadn't come down. We told him we considered this a matter of simply executing an amendment to the Packard dealer sales agreement; we did not consider it a legal matter, and there was kind of a sharp argument that occurred between Mr. Donald Webster and us, and for a while it appeared that Mr. Donald Webster wasn't going to talk to us at all. When he wanted to know why we hadn't brought the attorneys, after we explained that we came down on a commercial and not on a legal matter, he still felt that we should have brought our attorneys, and we told him we felt it was our prerogative inasmuch as we had to pay these attorneys, to decide when we had a legal question and wanted to hire counsel. After a few minutes Mr. Donald Webster apparently decided to talk to us. And he asked us to identify ourselves, and as we did he continued to make some memorandum as to who we were and our positions. We didn't get a chance to talk about it—we were trying to talk about the extension of the sales agreement; we didn't get an opportunity to talk about it. As a matter of [1477] fact, we couldn't get a word in edgewise because Mr. Donald Webster talked for an hour or more. He was equipped with a lot of documents like you lawyers all have there, arranged in some kind of sequence, and he went through this long list of documents dating back to a period that I knew nothing about and Mr. Abernathy knew nothing about, having to do with the proposal for suing the Packard Motor Car Company for an antitrust action. And we simply sat and listened during the course of this talk, waiting for time to discuss what we came down to discuss, which was

the extension of the agreement which the zone apparently for some reason or other had not been able to get executed. That was why we came down. So after a considerable length of time and a considerable bit of discussion which we listened to because we had to, we finally got down toward the end of the meeting, and Mr. Donald Webster had covered everything that he had to cover, apparently, and Mr. Abernethy and I proposed that we settle the matter by signing the amendment to the sales agreement. We asked Donald Webster whether or not he was an officer of the Webster Motor Car Company, which we did not know, because if he wasn't there was no use in discussing executing an agreement there. He said, as I recall it, that he was a vice president [1478] of the Webster Motor Car Company. Then Mr. Abernethy and I proposed that we execute an amendment to the agreement then and there and settle the matter, which was what we came down to do. Mr. Donald Webster expressed doubt about executing an amendment to March 31st of the following year, on the ground that the Packard Motor Car Company might not treat fairly with him or they might find reason to discontinue him during the year, or they might be doing that only to discontinue him on April 1st of the next year. I was trying to reassure him, as the man who handled the contracting of dealers, and the man who had charge of policy, that he would be treated with the same consideration as any other dealer. I tried to explain to him that our policy was not to make advance commitments of any shape, nature or description, to anybody at any time, because we dealt with the situation at the time of expiration, as it might exist at that time, and we didn't have any crystal ball to look ahead and tell us what the situation was going to be. Mr. Abernethy had been listening to me during this fairly short discussion between Donald and me, and he became impatient and he said, Look,

I am here and I am assistant general manager; I am in charge of the field; I have full authority and full responsibility, and I will execute an [1479] agreement with you, and I will give you assurance, as the man responsible for it, that when March 31st comes next year you will get the same consideration anybody else gets. Donald Webster said, I don't have authority anyhow to execute an agreement, but I will submit it to the board of directors for their consideration. We said, How long is that going to take? Well, he said, not too long; perhaps a week, as soon as we can do it. So that was essentially the end of the discussion, and we went back to the zone office to talk it over.

Q. After you had given your personal assurance, and Mr. Abernethy gave his personal assurance, did Donald Webster insist upon somebody else further assuring the renewal of the contract? A. Well, he had been asking what assurance, if we were willing to make a speical agreement or some special assurance of the continuation of the contract beyond March 31st of the succeeding year, and I was trying to explain to him why it was not our policy to make that type of agreement. And Mr. Abernethy joined in the conversation to tell him that he was the responsible man so far as Packard Motor Car Company was concerned; he was present on the ground and willing to give him his assurance but we were not willing to give him any kind of assurance that would extend beyond March 31st.

[1480] Q. Was there any complaint that these assurances were not sufficient at that time? A. No. As I recall it, Mr. Denit, when Mr. Abernethy made the offer, Donald said he would have to take it up with the board of directors, and there was nothing further——

* * *

Q. Then did the meeting adjourn after Mr. Webster said he would have to take it up with the board of directors? A. Yes, sir.

Q. Did you have any further contact with this dealership situation after that meeting? A. Yes. We had gone back to Detroit for a period of time, and I think we received a couple of letters, I have forgotten exactly what the letters were. I think there was one of them from Mr. Leahy. I think there were several reports from the zone. We kept in touch with the situation to find out if anything was happening, at any rate, and after a period of time we decided that the thing had to be settled. It couldn't drag on indefinitely. Sometime in June we consulted counsel as to what kind of action we should take in writing to put a definite end to it so it would stop some place. Counsel gave us a letter [1481] notifying the—I don't know what the legal purport of the letter was—but a letter repeating in writing the offer that had been made, and giving them a fixed period of time in which to return a sales agreement. Otherwise, the thing was going to come to an end because it was just dragging on, and it seemed to be getting no place.

Q. Was that letter written June 4, 1952? A. It might have been. I don't recall the exact date. I would recall the letter if I saw it.

Q. It already appears here that the time given for accepting a renewal contract expired, and the renewal contract was never signed. Mr. Armstrong, when you and Mr. Abernethy were conferring in Mr. Leahy's office, as you have told us, did Packard have any commitment with Zell or anybody else which would have made it impossible for Packard to consider the further renewal of Webster's contract after

March 31, 1953? A. No, sir. We had no commitments nor made any such commitments.

* * *

Q. Was there any reason then existing of which you [1482] had knowledge which would have made it impossible for Packard to consider Webster's application for renewal on March 31, 1953 solely upon its merits under the conditions then existing? A. No, sir.

* * *

[1484] Q. At the conference in Mr. Leahy's office, you gave Mr. Donald Webster the assurance that upon the expiration of the renewal contract of March 31, 1953 an application for further renewal would be considered on its merits in the light of conditions then existing, and that Mr. Webster would be treated the same as any other dealer. Isn't that correct? A. That's correct.

Q. Was that your honest purpose and intent at the time? A. Yes.

Q. Now, Mr. Armstrong, did the zone here in Washington maintain a warehouse? A. Yes, sir.

Q. With cars always available to dealers with the right to make a selection as to color or style, etcetera, from the warehouse? A. Yes, sir. That was the purpose of the warehouse. [1485] Q. Was that true with respect to both Mr. Webster and Mr. Zell? A. Yes, sir.

* * *

Q. When is price class determined in the industry? A. I don't understand, Mr. Denit, what you mean by "determine." You mean, when do we find out what our price class in a given area is?

Q. Yes, sir. A. About 45 days after the end of the month when we receive our report from R. L. Polk.

Q. Then is it a fact that you determine in each year what other cars are in your price class? A. We determined month—well, we determine from [1486] month to month what our price class penetration in all points in the country is. If you mean by your question, when is the composition of the cars in our price class changed, it is changed whenever competition either drops or puts a new car into the line, reduces the price of the car in the line, or changes its specifications. Generally, at model change time.

Q. Then it is determined who your competitors are, and what they have to offer to the public, comparable to what you offer? A. That's correct.

Q. You were in the automobile industry in the years 40 to 48, were you not? A. Yes, sir.

Q. Will you tell us whether that period was a normal or abnormal period? A. It was an abnormal period.

Q. In what way? A. The supply of cars was not as great as the public demand. It was what we call a "seller's market."

Q. When did the period change from abnormal to a more or less normal period? A. Well, the period didn't change for all makes in the industry at the same time, Mr. Denit. Certain cars remained in the seller's market longer than other cars. For Packard the seller's market as such ended about October 1948. [1487] I mean, it began after—you don't fall off the end of the diving board with a thing like that. It is a declining curve. The declining curve started with Packard in October of 1948.

Q. Which meant that the market was gradually becoming a buyer's market as distinguished from a seller's market? A. That's true. That is when the transition for Packard started.

Q. Would you regard the years 1950 and '51 as more or less average years or normal years? A. They were competitive years.

Q. Were they more representative of the average than the period from '46 to the middle of '48? A. Yes. From '46 to the middle of '48 was distinctly abnormal on the seller's side.

Q. Did the period '46 through the middle of '48 indicate anything with respect to dealers' profits, as to whether they were normal or abnormal? A. They were abnormally high.

Q. Why? A. Because there were more buyers than there were cars to supply the demand. The dealer made his full gross profit of the cars and made money off of his used cars.

Cross-Examination by Mr. Leahy:

[1488] Q. Do you say they were abnormal in '46, '47 and '48 because of secondhand business, selling the used cars? A. No, sir. In normal times the dealer gives away a part of his gross profit as an over-allowance on the used car or as a discount. In those years, so far as the new cars were concerned, they generally made their full gross profit. Normally, if they wash out their used cars, what we call a wash out, if he gets as much out of his used car when he resells it after reconditioning and selling expense, as he puts into it, he is doing a good job.

In this period he made money off the used cars. Used cars and new cars go together.

Q. How many cars did Webster get in '46 from Packard? A. I do not know.

* * *

[1490] Q. How much production was it in '46? A. Somewhere in the neighborhood of 40,000 cars.

* * *

[1491] Q. How many cars did you produce in '47? Some 50,000 or 50 odd thousand, as I recall it.

Q. How many dealers did you have in the United States in '47? A. Well, the peak of our dealer strength I think was in '47.

[1492] Q. In '47? A. Yes. It was in the neighborhood, I believe, of 1,800. The top number of dealers we had was 2,000.

Q. How many dealers did you have in '46? A. Mr. Leahy, I can't give you the number of dealers by years.

Q. Do you remember whether they increased or decreased from '46 to '47? A. I remember that there was a gradual attrition until almost this year. There was a gradual attrition in the number of Packard dealers from a peak of about 2,000 in the early post-war period.

Q. Can you answer the question as to whether there was a decrease from '47 to '46? A. You mean the number of dealers in '47 decreased from the number of dealers in '46?

Q. Yes. A. Well, I believe there was, I can't specifically place the period at which we did not renew a number of smaller contracts, the Dealers, so-called, but there was a period in there in which we deliberately reduced the number of dealers because there weren't enough cars available to supply them. I can't fix that, but it was somewhere in that period.

* * *

[1493] Q. You knew you were going to be asked whether '46, '47 and '48 were abnormal years, didn't you? A. No, sir, I did not know that until Mr. Denit asked me.

Q. Had you heard him ask other witnesses? A. Yes, sir.

Q. Didn't you hear him ask Mr. Briggs? A. Yes, sir.

Q. Didn't you hear him ask Mr. Abernethy? A. Yes, sir.

Q. And you knew you were going to testify? A. Yes, sir.

[1494] Q. So he was asking every single Packard witness that point, wasn't he? A. He did up to me, and he asked me.

The Court: I would like to have counsel come to the bench for a moment.

(At the bench:)

The Court: Mr. Leahy, I assume there is no dispute over the fact that '46, '47 and '48 was the seller's market, because Mr. Webster testified to that effect, and certainly it is a matter of common knowledge, something that every automobile user knows, that it was hard to get a car in those years, and the dealer did you a favor, and exacted harsh terms when he sold you a car. I was wondering whether you want to continue this line of cross examination in view of the fact that there has been no dispute about it.

Mr. Leahy: I don't mind that, but I do mind trying to hook up what they call abnormality of years, as they put it, on the ground that there was scarce production with the question of damages, because——

The Court: Of course, they have a right to do that. Since there was a seller's market in those years, and in view of the fact that Mr. Webster

testified to that as a fact, that the profits were higher than the average, therefore, in getting an over-all picture of the run of the profits during [1495] the years '46 to '52, March 31, 1952, you have to give less effect to the profits of '47 and '48 than you might otherwise if those years were normal years. On the other hand, I assume that you are going to argue that by the same token '49 and '50 were abnormal years, because of the fire. They couldn't do as much business as they might otherwise do. Isn't that a matter of argument?

Mr. Leahy: Just so long as we get clear to the jury's mind the question of production so we can read Packard out of this failure to produce out of this picture.

The Court: I am wondering whether there is any use cross examining concerning whether '46 to '48 were abnormal years, because even Mr. Webster conceded that in his testimony.

Mr. Leahy: They were abnormal in that there was a scarcity of cars, Packard cars.

The Court: Yes, scarcity of all cars.

Mr. Leahy: Yes.

The Court: So, it seems to me that there is no dispute over that fact.

Mr. Leahy: All right.

* * *

[1497] Q. Did you know about the fire in 1949 in Mr. Webster's place of business? A. No, sir.

Q. You didn't know it had occurred when it did occur, if it did occur? A. No, sir.

Q. You didn't know anything about that? A. No, sir.

* * *

[1498] Q. Let me put it this way. Up to the time of this trial did you know that Webster had suffered a fire? A. Yes, I heard the matter discussed in the offices of counsel, in preparation for the case, Mr. Leahy.

Q. But not until the preparation of the case for trial did you know that there had been a fire at Webster's place of business? A. That is right.

Q. Did you know about the difficulty that Packard suffered with reference to the sale of the '49 model? A. I don't think I understand your question, Mr. Leahy.

Q. Did you put out a model in '49 that didn't catch on with the public? [1499] A. In 1949 we sold the largest number of cars, Mr. Leahy, that Packard has sold in the entire postwar period.

Q. When was it you had the model that didn't catch on with the public? A. I presume you are referring to what was called the inverted bathtub model.

Q. I think we have heard it called that. When did you get into that inverted bathtub? A. I think it was in 1947, as I recall it.

Q. Are you sure about that? A. I am not sure about it, but approximately that period.

* * *

[1501] Q. Did the dealers have any trouble in moving any of these models, that you recall? A. Yes. The dealers had trouble in moving the models when we had continued the model beyond the date that we should have changed it.

Q. How long did you keep the same model on the market? Do you remember? A. From about 1947 until—essentially the same styling—from 1947 to 1951.

* * *

[1502] Now, let's go back, Mr. Armstrong—when did you first hear of any difficulty whatsoever with regard to

Mr. Webster's renewal? A. When we received a letter of transmittal from Marshall Beck sometime in February, enclosing a copy of a letter that he had written to Mr. Webster, a copy of a letter from Mr. Webster which took an adverse and opposite position to the position described in Mr. Beck's letter, and the report which Mr. Beck seemed to have submitted to support his contention that his version of what happened was correct.

Q. Now, theretofore and at or about February 11th Mr. Briggs had made the decision to do what Mr. Zell had asked to be done in the conference in New York, isn't that right? A. On about that date Mr. Briggs had made the decision to select the Zell Motor Car Company as the dealer to remain in Baltimore, rather than Webster.

Q. Did he say "select"? [1503] Did you say select the dealer which was to stay? A. I may have used the word. I don't believe I could possibly repeat the exact language that was used by Mr. Briggs.

Q. Did you ever hear any proposition having been put up by Mr. Zell that Packard would select whether Mr. Zell or Mr. Webster should remain?

* * *

A. No, sir.

By Mr. Leahy:

Q. Didn't you hear it distinctly put up that Mr. Zell had said in New York that he had been constantly losing money; was constantly doing business in the red; that he had a lease which had to be renewed shortly; that he did not intend to continue to operate in the red; and unless he were made the sole dealer in Baltimore he was not going to renew the lease? A. I think that is substantially the report.

[1504] Q. And didn't you have it further reported to you that you people, and you had there Mr. Briggs, didn't you—— A. So I have heard the testimony. Mr. Briggs is the one I heard.

Q. Didn't you know before that that they were meeting in New York? A. No, sir, I did not know they were going to hold a conference in New York.

* * *

Q. And you did have several conversations and conferences in Detroit as to whether or not you would accede to Mr. Zell's demand, isn't that right? A. Well, I don't think that it was a question of acceding to Mr. Zell's demand. The discussion in Detroit had to do with whether we would elect to have Zell as the sole remaining dealer in Baltimore, or Webster.

Q. And you had to make that election because Mr. Zell had told you that unless you did make it his way, that he [1505] wouldn't remain in business, isn't that right? A. Well, I don't know what you mean by that phrase "his way."

Q. That he was to be the sole dealer. A. That is correct.

Q. Now, then, what you were considering in Detroit was whether or not you would make Mr. Zell the sole dealer, isn't that right? A. That is right.

Q. And at that time you had three in Baltimore who were direct dealers with the factory, didn't you? A. I have subsequently heard it. At the time I don't recall DeBaugh having been mentioned.

* * *

Q. Now, then, in order to make Mr. Zell the sole dealer, in accordance with what he told you in the conference in New York, it was necessary for you to conclude whether or not you would renew the franchise of both DeBaugh and Mr. Webster; isn't that right? A. I think that follows.

[1506] Q. And you discussed that together in the top side, and among the top officials, didn't you? A. Yes, sir.

Q. You call it the staff, don't you? A. No, sir. The staff refers to all of the department heads. I don't know that all the department heads were consulted.

Q. Well, the department heads and the officers who had the authority to make the decision that would put Zell as the sole dealer met in conference in Detroit? A. That is right.

Q. Isn't that right? A. That is correct.

Q. And you met on several occasions, didn't you? A. We discussed the matter on several occasions. I don't recall that we had any formal meeting on it.

Q. And you went over the matter very carefully, did you? A. I don't recall that we went over it with great care, because the facts were pretty well known to us.

Q. In other words, you knew pretty much the factual situation, didn't you?

* * *

[1507] A. Well, I don't know how much territory the word "factual" takes in. We knew generally that Zell was a large dealer and Webster was a small dealer. I don't recall having gone into any detail of the number of cars that they sold.

Q. Did you know what the quota was of Mr. Zell at the time? A. I think we did.

Q. 400, wasn't it? A. I don't remember. That sounds approximately right.

Q. Didn't you look it up? A. Well, we undoubtedly knew it at the time.

Q. You talked about volume business, didn't you? A. Yes.

Q. Zell was the man who produced volume, wasn't he? A. Yes.

Q. How much volume did he produce? [1508] A. I don't remember that, Mr. Leahy.

Q. Don't you remember he never once met his quota? A. I don't remember whether he met his quota? I don't remember whether he met his quota or whether he didn't.

Q. Didn't you know in the year 1951, which was the last year you had before his request in New York, that he had sold fewer cars than he had in 1950? A. I may have known it at the time.

Q. Did you know that he hadn't sold more than 239 cars in 1951? A. No, sir.

Q. Do you call that volume? A. For Baltimore?

Q. Yes. A. No.

Q. Did you know that Mr. Zell had never once in the past three years broken into the black? A. Well, I understood at the time that Mr. Zell had been losing money, yes, sir.

Q. Well, you knew it, didn't you? A. Yes, sir.

Q. And that is what he told you in New York, he wasn't going to continue to lose it? A. He didn't tell me anything in New York. I wasn't [1509] in New York.

Q. I mean the representatives. A. I have heard it so testified, yes.

Q. And did you know that Mr. Webster was continuously in the black? A. No, sir, I didn't know it at the time. I have heard it during the course of the trial.

Q. Did you know how many cars Mr. Webster had sold in 1951? A. Are all of these questions with reference to the period in which we were considering the decision?

Q. Yes, that is right. A. Yes, we undoubtedly did.

Q. But you don't remember now? A. No.

Q. Didn't you make any notes of any of these conferences? A. No, sir.

Q. Pretty important decision you were making, wasn't it? A. I think the decision was not difficult for us to make.

Q. The policy of Packard had been fixed, hadn't it, in 1946, as a multiple dealer policy? A. No, sir. I have heard you use that phrase several [1510] times. We had no such policy known as a multiple dealer policy. We had a policy known as the direct dealer system.

Q. The direct dealer system? A. That is correct.

Q. As opposed to a distributorship? A. That is correct.

Q. And did you know whether in 1946 that Packard had a multiple direct dealer then in Baltimore? A. We had more than one dealer in Baltimore.

* * *

[1511] Q. All right. Then you were overturning a multiple direct dealer system to put in a single dealer, weren't you? A. No, sir. We had lost the dealers by attrition.

Q. Attrition? A. We weren't trying to reduce the number of dealers in Baltimore, Mr. Leahy. The dealers in Baltimore had gotten out.

Q. You had had all this matter discussed, hadn't you, only two months before? A. Two months before January?

Q. Two months before January 29th. A. Well, my first memory of the Baltimore situation, Mr. Leahy, came about the time when we had lost most of the dealers that you have mentioned, so that I know the circumstances under which the various dealers were lost. My attention was called to it

at the time the Baltimore situation became critical because of the loss of dealers in the Baltimore area.

Q. When was it your attention was called to the fact that your situation was critical because of the attrition of the dealers? A. Well, I believe it was about September of 1951.

[1512] Q. Was it a matter of concern? A. No—well, yes, it was a matter of concern. It was called to my attention by the then eastern sales manager who had made a trip through the Washington Zone and had reported on several unsatisfactory situations in the Washington Zone. And that is the first time that I became personally aware of the approaching critical nature of the dealer situation in Baltimore.

Q. Now, in that critical situation of dealers in Baltimore, do you know at the very time you have just mentioned, in September, that Zell was trying to get Packard to agree not to fill Schulte's dealership? A. I have noticed it in subsequent reports by Mr. Platfoot and I saw the report, and Mr. Platfoot sat alongside of my desk and discussed it at the time.

Q. Did you agree with Mr. Platfoot that it should not be refilled? A. That wasn't my province to agree with him.

Q. Well, did you, whether it was your province or not? A. No. He didn't discuss it with me from that standpoint.

Q. Didn't he discuss it with you from the standpoint of refilling Schulte's place? A. No, sir.

Q. Didn't you know at this time that Zell was saying, [1513] I have been losing money, I have been constantly in the red, and I don't propose to continue unless you agree not to refill Schulte's place? A. I know you are quoting from the document; I said I have read the document. My

only memory until the trial came up in the preparation for this trial was that we had a critical situation in Baltimore.

Q. Are you telling us that you don't remember anything about the refusal to renew Schulte? A. Refusal to renew who?

Q. Schulte's place. A. There was never such a conversation.

By the Court:

Q. Were you superior or subordinate to Mr. Briggs? A. Subordinate.

Q. Subordinate? A. Subordinate.

By Mr. Leahy:

Q. Mr. Platfoot had the authority, didn't he, to do what he did and what he reported he had done? A. The authority from me?

Q. Oh, I mean from the company. A. Well, I wasn't in the discussion between Mr. Platfoot and Mr. Briggs.

Q. Then you don't know whether Mr. Platfoot was then [1514] eastern manager? A. Oh, yes.

Q. And had the authority not to refill? A. Sure.

* * *

[1517] Q. Is it your testimony now that the first time that you have any recollection of Zell's having made the threat to quit unless he was given a sole dealership in Baltimore was after the January 29th conference in New York? A. That's the first time that I recall it.

Q. But you had heard him saying that he was going to quit unless something else was done about reducing competition by Packard, isn't that right? A. No, sir. Up until that time, as I told you before, that Mr. Platfoot discussed it, I have no specific recollection, and was paying no particular attention to Baltimore.

[1518] Q. Well, at that time then you remember that by acceding to the request of Mr. Zell, you furthered or you made more critical the situation of your dealers in Baltimore? A. Do you mean by not replacing the dealer who had gone out?

Q. Yes. A. I don't believe, Mr. Leahy, that we had any reasonable prospect to replace him.

Q. Oh, you didn't know that the zone was looking around for prospects to take the place of Mr. Schulte? A. I wasn't aware that we had any prospects in the area.

Q. I didn't ask you that question, did I?

Mr. Leahy: Would you read the question, please?

The Court: You may read the question.

The Reporter: (Reading):—

"Q. Oh, didn't you know that the zone was looking around for prospects to take the place of Mr. Schulte?"

The Witness: No, sir.

By Mr. Leahy:

Q. Don't you remember any of the weekly reports in which Mr. Porter advised you that he was over there, or Mr. Denholm, looking over prospects to take Mr. Schulte's [1519] place?

* * *

The Witness: We did not receive reports in the central office from the district managers that I recall. At least, I didn't see them.

By Mr. Leahy:

Q. Did you not tell us you did see some of those weekly reports that it varied? A. I said I saw weekly reports

from the zone managers, and the weekly reports from the division managers. I said nothing about district managers. We didn't receive district managers' reports or business management reports.

Q. Didn't you receive dealer contact reports? A. No, sir, the dealer contact reports were made by [1520] the district managers to the zone manager, and were kept in the zone office.

* * *

[1521] Q. You say that whatever information you got about Mr. Webster came at a time when the letter of February 14th was sent together with the letter of February 20th from Mr. Webster, is that right? A. Yes, sir.

[1522] Q. Now, you of course were thoroughly familiar with Mr. Webster's place of business, weren't you? A. No, sir, I have never been in it.

Q. How do you know then it was suburban? A. Because that was the information that was discussed by the people who were familiar with it.

Q. Who were the ones who said it was suburban? A. Mr. Briggs, Mr. Abernethy, Mr. Platfoot, possibly Mr.——

Q. What did you understand "suburban" to mean? A. Not in the downtown business area.

Q. Do you mean that it was somewhere outside of the business transactions generally? A. No, sir, I don't know specifically the location. I have never seen it.

* * *

Q. I am going to show you Plaintiffs' Exhibit 6 and ask you if you know anything about that, and I am going to [1523] ask you to look at Mr. Webster's location and what your company considered it to be. Do you see it? A. It

says, "Centrally located residential area and business district."

* * *

The Court: Yes. You may have the question read. Will you read the question, please?

The Reporter: (Reading)—

"Question: Would you call that suburban now?"

The Witness: I wouldn't know from the description.

By Mr. Leahy:

Q. So you say something "centrally located to residential area and business district"—— A. Well, it might be centrally located to a suburban residential and business district. The business districts aren't all downtown, Mr. Leahy.

* * *

[1524] Q. Mr. Armstrong, I think I had shown you Plaintiffs' Exhibit No. 6, the Packard Golden Anniversary Dealers Sales Agreement, and you had seen there in the location of Webster Motor Company? A. Yes, sir.

Q. Did you know that the front of the Webster building at the time was 230 feet? A. No, sir.

Q. Or the depth 40 feet? A. No, sir.

Q. Was Buick in your price class at that time? A. Yes, sir.

Q. Did you know that the Buick office was two miles away? A. No, sir.

[1525] Q. Or that Chrysler, which was also in your price class, wasn't it——

* * *

Q. Chrysler was in your price class, wasn't it, Mr. Armstrong? A. Yes, sir.

[1526] Q. Did you know that the Chrysler people had a shop within three-quarters of a mile of Webster? A. I knew the location of no competitive dealer in the Baltimore area.

The Court: I suggest you speak a little louder, Mr. Armstrong, because a lot of people have to hear you.

The Witness: Mr. Leahy, I did not know the location of any of the competitive dealers in Baltimore.

By Mr. Leahy:

Q. So you didn't know that Cadillac and Oldsmobile were both only a mile away? A. No, sir. I said I knew none of them.

Q. And they are both in your price class, aren't they? A. Yes, sir.

Q. Or weren't they at that time? A. Yes, sir.

* * *

[1528] Q. When was it that you came to the conclusion that Mr. Beck's letter of February 14th might be construed as having committed Packard to an extension or renewal for a full year of the Webster contract? A. When I read it.

Q. When was that? A. Shortly after it was received.

Q. And when was that? A. It was in February.

Q. When did you go see your lawyers? A. Almost immediately.

Q. Had you seen them at all before that time and consulted with them as to whether or not you had a righ.

to terminate the other dealers in Baltimore and make Baltimore a one-dealer city for Zell? A. No, sir.

Q. In your discussion then, I take it, prior to the receipt of the letter in February from Mr. Beck, of February [1529] 14th, enclosing the letter of February 20th, you had never consulted counsel? A. I had never consulted counsel? Do you mean about this particular situation?

Q. Yes, sir. A. Not in that regard.

Q. Do you know whether any other man had? A. I don't believe so, because I was the contact man, the man whose responsibility it was to take information or questions to the attorneys, and to bring the decision of the attorneys back to the operating management.

Q. How far was your office from Mr. Briggs' office? A. Next door.

Q. How far was your office from Mr. Abernethy's office? A. Next door.

Q. You conferred daily, didn't you? A. Yes, sir.

Q. Several times a day? A. Almost continuously.

[1530] Q. And did you go in February, you think, to see the lawyers about this February 14th letter? A. I went as soon as I received the letter of transmittal from Beck with the two attached letters and report.

Q. Why were you so concerned about that letter? A. Because it appeared to me to be a commitment on the part of Packard to continue the Webster contract for another year.

Q. When you already had made up your mind not to do so? A. That's correct.

Q. Did you send Mr. Webster any written communication that you did not intend to renew his contract? A. No, sir.

Q. You did draw up a regular form, didn't you, when it became what you thought necessary to send one? A. Not in all instances. In some instances the notice was given verbally.

Q. But you in DeBaugh's were careful to draw a letter? A. No, sir, I didn't draw a letter in the DeBaugh case.

Q. Didn't you draw the DeBaugh letter? A. No, sir.

Q. Who did? A. I drew a form letter. Well, I didn't draw a form letter. Counsel had drawn a form letter sometime prior to [1531] the situation. As a matter of fact, several years prior. We had instructed the zone offices to use this form of notice when they sent a notice to a dealer of intention not to renew. When Beck wrote the letter which we criticized, I again sent Beck a copy of the letter which had been sent several years previously for use in similar instances.

Q. Did you tell Beck at that time that this was an old letter which is just being reinstated? A. It may have been a revised version of it.

Q. Well, what was it? Won't you tell us? A. It was a letter stating in general effect to the dealer—I can't remember the exact wording of it but—This is to notify you that your Packard sales agreement expires by its own terms March 31st. Whatever year it was. That we do not intend to renew or make a new agreement with you. Because in certain instances instead of renewing, we made a complete new sales agreement. That in general was the text of the letter. I don't remember whether the previous letter had exactly that same wording or not. At any rate, I sent it to him because he hadn't used it in the case of

Webster. He had written this letter. I sent him again a copy of the form to be used under similar circumstances.

[1532] Q. When did you send him a form letter before? A. I think in about 1949.

Q. Do you know? A. No, sir, I don't remember the exact date.

Q. Do you know what dealers had been notified that they would not be renewed in 1949, 1950 or 1951? A. I could hardly be expected to do that because at the expiration every year on March 31st there were a number of dealers who were notified we didn't intend to continue.

Q. I am talking about Baltimore. We are not interested in the United States. A. You didn't specify that, Mr. Leahy.

Q. I see. I will try to be very specific with you. Now, with reference to Baltimore, will you tell the jury what dealers you had had occasion to send letters to terminate or not renew their franchises in 1949, '50 or '51? A. None that I know of.

Q. Let me show you this letter dated February 20, 1952. That is Exhibit No. 34. That's the letter in which you transmitted to Mr. Beck the letter which he should use on terminating DeBaugh, wasn't it? A. On terminating any dealer. It is the standard form that was used by all of the zone offices, Mr. Leahy.

Q. Was there any dealer at that time either in the city of Washington or any place in the zone at that date, [1533] February 29, 1952, which you knew was going to be terminated or whose franchise would not be renewed outside of Baltimore, Maryland? A. I wouldn't be able to answer that question. The Washington zone may have had other dealers. I don't know.

Q. Mr. Armstrong, you went over the matter very carefully with your attorneys, haven't you? A. Yes, indeed.

Q. And didn't you go over this to prepare yourself for cross examination upon these letters that you had written? A. I didn't go over it with the idea of making a list of all the dealers who might have been terminated March 31, 1952.

Q. But you know how many dealers there were in Baltimore, didn't you, on February 29, 1952? A. Yes, sir.

Q. How many were there? A. There were two. There were three, I should say.

Q. What? A. There were three.

Q. Three. How many were going to be terminated? A. Two.

Q. Why didn't you ask Mr. Beck to send Mr.—— A. I would say that how many were going to be terminated [1534] as of that date, we concluded that one of them who was originally to have his contract expire on March 31st, we were already committed to renew.

Q. All right. That left you two more. You were committed only to Zell, weren't you? A. We were committed on Webster as of that date.

Q. Committed on February 29, 1952? A. I think so.

Q. What makes you say that? A. I think that's after the date on which we received—you can refresh my memory—as I recall it, that's after the date on which he had written the letter to Webster, because the occasion of my sending that letter was the fact that I had read that letter to Webster which we criticized.

Q. That you considered that the letter of February 14th was a commitment on the part of Packard to renew Mr. Webster for a full year? A. That is right.

Q. Why didn't you do it? A. We endeavored to get the zone to do it.

Q. You endeavored, didn't you, sometime in April? A. No, sir, we instructed them shortly after we had considered the matter and sent Fenn to talk with Mr. Zell to find out what our situation was, we then instructed them to go ahead and make a one year agreement.

[1535] Q. Instructed to make a one year agreement with Mr. Webster before February 18? A. February 18?

Q. I mean April 18? A. Yes, prior to that time.

Q. When was it? A. Our original instruction to Mr. Beck was to execute a one year extension of the agreement. Mr. Beck talked us out of it because he said he was quite sure that Mr. Richard Webster would sign one terminating July 1. He submitted it over our initial objection and against our good judgment.

Q. All right. Let's see if we can take it step by step. On February 11th, you had determined not to renew Mr. Webster? A. If that's the date.

Q. Well, it's that date, isn't it? A. Well, I say if that's the date. We had determined, yes.

Q. You had determined. Then you got a letter some time in February in which you felt that you had been terminated or that you had been committed to a renewal of the franchise? A. That's correct.

Q. And you got legal advice on it? [1536] A. That's right.

Q. And the legal advice was that you were so committed? A. That's right.

Q. But then Mr. Beck persuaded you were not committed? A. No. The attorneys did not advise us that we had to continue for one year. All of our contracts ran for the standard period of a year.

Q. All right. Didn't you tell us that the attorneys had corroborated your thought in the matter and said you were responsible for another year? A. No, sir. The attorneys said, as I recall it, that we were committed to an extension as far as July 1 mentioned in this letter. However, July 1 is the date which is non-standard with us, and under our policy if we extend it at all it was our policy to extend it for one year.

[1537] Q. Why didn't you offer that to Mr. Webster direct? A. We instructed him to offer it and he insisted that he was sure that Mr. Webster would be satisfied with the date of July 1st, and he was sure he would be willing to sign it.

Q. And when did you give him that instruction to sign it to July 1st? A. Somewhere around the first week in April, I believe, or perhaps a little before that.

Q. Why did you wait from the time that your lawyers in February told you that you were responsible? A. We might have informed him earlier than that.

Q. Beg pardon? A. We might have informed him earlier than that.

Q. Well, did you? A. I don't remember the exact date, Mr. Leahy. I told you that.

Q. Well, when did you sign up Zell for another year? A. I don't know that.

Q. You don't know that? A. No, sir.

Q. Did you know you had done it March 27, 1952? A. No, sir.

Q. You didn't know that? [1538] A. No, sir.

Q. Did you on April 1st authorize Mr. Beck to sign up Mr. Webster for another year? A. Well, as I have stated before, we authorized Mr. Beck to sign him up for one year as of the date on which we gave him the original

instructions. Now, as I recall, you showed me a document a while ago that had Roy Abernethy's initials or memorandum on the upper right-hand corner, and I think it was dated April 1st. My memory is we told him earlier than that.

Q. How did you do it? By letter? A. No, sir. We told him over the telephone.

Q. There isn't any writing at all so far as Webster is concerned, is there, so far as you recall, from either office, either the zone office or the home office? A. Yes, sir. I think there is writing with regard to him. We dictated—for example, I dictated over the telephone the letter setting the termination date sometime in June, I believe, and I think there were—well, I remember that one in particular.

Q. Well, let me refresh your mind. You wrote the one that you wanted to give to DeBaugh, didn't you? A. I said before we didn't write that specifically [1539] for DeBaugh, but for use by the Washington Zone, who didn't appear to have a copy when I talked to them on the phone, so I sent them a copy.

Q. This happened to be on February 29th, at the time they were to forward this to DeBaugh; is that right? A. I believe that is the date. I don't know about the time they were to forward it to DeBaugh.

* * *

Q. Did you dictate personally the letter of February 29th? A. I dictated the blank form which was attached to my letter of transmittal, over the telephone, and confirmed it by letter.

[1540] Q. Was there any reason which you had at that time to keep the letter simple? A. Yes.

Q. And there was no indication in the letter as to the reason for the failure to renew? A. No, sir. We were

specifically advised by counsel that we should not do that in event with any dealer.

Q. When did counsel advise you that you should not tell a dealer why you were not renewing him? A. In about 1949, as I recall it.

Q. It couldn't have been that this was one which was prepared purposely for DeBaugh, could it? A. Specifically, no.

* * *

Q. Was the letter of June 11th, or June 4th, which you sent to Mr. Beck also, a letter which had been prepared in 1949 by your lawyers? A. You mean the letter—may I see the letter, please?

Q. Yes; the letter which you said you sent to him with regard to the termination date. A. Notifying him that we expected him to return the [1541] contract by a certain date?

Q. Yes, that's the letter. A. Certainly not.

Q. Who dictated that letter? A. Our attorneys.

Q. Did they dictate that in 1949, or did they dictate it in June, 1952? A. They dictated it in June, 1952,

Q. There wasn't any step which you took with regard to this matter that you didn't take under advice of counsel, was there? A. Substantially that is correct.

Q. Ever since Mr. Beck sent the letter to you of February 14th, from that period on, whatever was done by your office was done under advice of counsel? A. Generally speaking.

Q. Did you object that Mr. Webster should have his own lawyer, his own son, advising him? A. No.

Q. You didn't, did you? A. No.

Q. Now, the letter of June 4th followed the conference of May 20th in the office in which you said that you had

offered the renewal of the contract; is that right? A. That is correct.

[1542] Q. Did you have the contract with you? A. No, sir.

Q. What were you going to renew, Mr. Armstrong? A. Well, a copy of the proposed agreement had been delivered by the district manager to the Webster Motor Company. However, I did not see any copy at the time.

Q. Now, you came down here, you and Abernethy together, after advice of counsel, didn't you? A. We didn't come down on advice of counsel, no. We came down on our own initiative after having checked the situation with counsel.

Q. Oh, you knew well enough, didn't you, about my letter of April 15th, didn't you? A. Yes, sir.

Q. And you knew about my letter of May 6th, didn't you? A. I don't know the dates in the letter. I know that you had written to the general point that you had been retained to press an antitrust action, I believe.

Q. I am going to show you Exhibit 120, the letter of May 6th. You remember this very well, don't you, Mr. Armstrong (handing the exhibit to the witness)? A. I may. I remember a longer letter than this.

Q. Don't you remember that—whether you remember another one or not? [1543] A. I don't know whether I do or not.

Q. Didn't you just see that only a day or two ago right here, with your lawyers? A. Well, I am not even sure of that. However, Mr. Leahy, I saw practically everything that was written with respect to it, so I very probably did.

Q. But you can't be sure about it, can you? A. That particular letter, I don't specifically remember, no, but I presume that is it.

Q. Didn't you know when you came down here and on May 20th that I had asked that we meet your counsel? A. Yes, sir, I knew that.

Q. "Confirming our conversation with you of today"—I am now writing to Mr. Beck—— A. Yes, sir.

Q. Did you know that I had talked with Mr. Beck on the 6th of May? A. I believe I did.

Q. "I think the most constructive approach to the Webster Motor Car matter would be for you to put your counsel in touch with us as soon as convenience will permit and then we as lawyers could look into the matter further. Thanking you, I am sincerely." A. Yes, sir, I remember that.

Q. You remember getting a request transmitted through [1544] Mr. Beck for some kind of arrangement for contact with your counsel? A. Yes, sir, and I have said so.

Q. Why didn't you do it? A. Because we didn't consider that it was a legal matter. So far as we were concerned, it was a question of renewing the sales agreement.

Q. It was a question of legal matter, didn't you tell us, from the 11th day of February? A. No, sir. I made no such statement.

Q. You said there wasn't a move you took since the first time you saw counsel in February except under advice of counsel, didn't you? A. I didn't say our counsel advised us. I said whenever we got a document or communication of any kind we took it to our attorney.

Q. Didn't I use the phrase "Didn't you after that take every step which you took under advice of counsel?" Don't you remember the phrase? A. Well, if you phrased it that way I think you are incorrect, because you are implying that counsel told us what to do. Counsel did not tell us what to do.

Q. Did you——

Mr. Denit: Let him finish his answer.

The Witness: Whenever we received a document or a [1545] communication of any kind we asked the opinion of our counsel as to the meaning or effect of it. The counsel does not advise us what to do in the commercial operation of our business. They give us advice on any legal aspect of what we do, not only with regard to a case like this, but practically with regard to everything that we do.

By Mr. Leahy:

Q. Did you think that the May 6th letter was a document? A. The one that you just showed me?

Q. Yes. A. Why, I think it is a document, yes.

Q. Did you take advice of counsel on that? A. I don't specifically remember that letter.

Q. And you don't remember whether or not you went to the counsel and said, Now, here, we have got another letter, May 6th, asking that Mr. Webster's counsel get in touch with you? A. We may have. I don't know.

Q. Well, didn't you? A. I have already told you, Mr. Leahy, I don't remember that specific letter. We may have asked him; I did know that you were asking to talk to our attorneys.

[1546] Q. Now, I am going to show you Exhibit 121, dated May 7th, which enclosed the letter of May 6th (handing exhibit to the witness). Take a look at that; look at the right-hand corner or the left-hand corner and see how many people advised about the receipt of that letter of May 6th. A. It would appear so, yes.

Q. Sir? A. I didn't deny it, Mr. Leahy. I said when you showed it to me I didn't remember it.

Q. You don't remember anything until you are plugged with a document to refresh your memory. A. Yes, I remember a lot of things.

Q. Now, you remember that you took that letter up with Mr. Briggs? A. Yes.

Q. And you also took it up with Mr. Abernethy, didn't you? A. I haven't denied that I knew it, Mr. Leahy.

Q. Now, after Mr. Abernethy and Mr. Armstrong and Mr. Briggs got my letter of May 6th asking us to be put in touch with counsel, now, don't you remember whether you advised with counsel? A. With regard to that particular letter?

Q. Oh, that's what we are talking about, yes. [1547] A. I say I do not remember specifically taking it up with counsel. I hadn't remembered it until you showed me the letter.

The Court: You have answered the question, you don't remember.

[1548] Q. And now I show you Exhibit 18. Did you dictate that letter? A. The letter was dictated to me by the attorney, and re-dictated by me to Mr. Marshall Beck.

Q. Who was the attorney? A. Mr. Henry G. Bogle.

Q. So you did have advice of counsel when you made the offer or submitted the offer to renew on June 4th, didn't you? A. We had advice from counsel as to what form the notification should take so that the offer of the sales agreement wouldn't continue indefinitely.

Q. You had just about a week before had the refusal, hadn't you, on May 20th? A. Had a refusal?

Q. Refusal to renew. You told us so. A. We did not have a refusal. We were notified by Mr. Donald Webster that he was going to take it up with his board of directors,

and we waited a while, and we heard nothing further from him. Then we decided we should do something to put an end to it so it didn't continue indefinitely. So we asked counsel for a letter which would adequately fulfill that purpose, and that's the letter.

Q. Why was it that you thought you needed the advice of counsel with regard to the offer to renew of June 4th but [1549] that you considered it merely a commercial matter a week and a half before? A. We wanted to terminate the thing. We didn't want it to remain indefinitely open. We wanted the thing brought to a conclusion.

Q. When was it that you changed your mind from its being a commercial matter to a legal one? A. We never did change our minds with regard to it.

Q. Didn't you say that the reason you didn't have your lawyers with you was because it was a commercial matter and not a legal one? A. We said that when you inquired. I beg your pardon. When Mr. Donald Webster inquired which one of us was an attorney, and when he found out we weren't attorneys, he wanted to know why we hadn't brought our attorneys.

Q. Is that what you said? A. Yes, sir.

Q. Are you sure about it? A. Yes, I am positive.

Q. Let me ask you this question: When you said that neither one of you was a lawyer, didn't Mr. Donald Webster look you right in the eye and say, "Mr. Armstrong, why didn't you bring your lawyer with you?" A. Very definitely he wanted to know why.

Q. What was your reply to that one? [1550] A. Our reply was that we came down to negotiate an extension of the sales agreement for another year, and we did not consider it a legal matter.

Q. I will ask you if this wasn't your reply: Didn't you say, "Donald, I would rather not say."? A. I don't recall.

Q. You might have said it, mightn't you? A. I wouldn't deny it. I don't remember.

Q. Didn't the conference then almost break up without almost having started? A. The conference almost broke up because apparently Donald wasn't willing to talk to us.

Q. What was it that induced the conference to open? A. I can't remember that, Mr. Leahy.

* * *

[1553] Q. Do you recall then that I asked Mr. Donald Webster to tell everything that he knew insofar as his father's case was concerned? A. You might have, Mr. Leahy.

Q. Did you make any report at all in writing of this particular conference? A. No, sir, not that I recall.

Q. Did you make any memorandum in writing? A. I don't recall having made one.

Q. Do you recall whether anybody did? A. Yes, I believe Marshall Beck made a report on it.

Q. I show you Exhibit No. 91 and ask you if you have seen that before and have read the contents thereof. A. Yes, it shows on the first sheet, on the letter——

[1554] The Court: Speak a little louder, Mr. Armstrong.

The Witness: My initials as having noted it are on the letter of transmittal.

By Mr. Leahy:

Q. Was that report made under your direction? A. No, sir.

Q. Was it made under the direction of any one of the officers? A. Will you permit me to read it? You asked me to read it.

Q. Oh, sure. A. I haven't read this since the time it was submitted.

(Witness read Plaintiffs' Exhibit 91.)

Q. Did you read it through? A. Yes, sir.

Q. Any portions of it you disagree with? A. Yes, I disagree with the statement of the intent of the meeting so far as we are concerned that he makes.

Q. With the purpose of the meeting? A. Yes.

Q. Yes. You said the purpose was to—— A. I didn't make a specific examination—I didn't read the letter just now with a view to taking exception to the statements that were made by Beck.

Q. Well, you did catch one in there? [1555] A. Yes, I did.

Q. You said you disagreed with the purpose of the meeting? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And that is what paragraph? A. It is paragraph two of the memorandum.

Q. Paragraph two of the memorandum says: "The purpose of the conference was to find out just what the Webster Motor Car Company intended to do, and what their specific charges would be in their threatened lawsuit." Isn't that right? A. Yes. I would agree with part of it, that it was to find out what they intended to do about the proposed agreement we had submitted. It was not our intention to find out what they wanted to do about the lawsuit, because—well, I think that answers your question.

Q. So Mr. Beck is in error about that, isn't he? A. Yes, sir.

Q. That's right. A. As to the primary purpose of the meeting.

Q. I beg your pardon? A. As to the primary purpose of the meeting.

[1556] Q. I see. Did you in any way advise him in a letter or anything of that kind that that was an erroneous report he was sending to you? A. No, sir.

Q. Do you know whether Mr. Abernethy did? A. No.

Q. Or Mr. Briggs? A. No, sir.

Q. Now, before you went into the conference you were careful to advise yourself, weren't you, about the entire contents of the Webster file? A. I wouldn't say the entire contents. We brought no file with us. When Roy Abernethy and I came from Detroit, before we went into the meeting, we asked for the zone file to bring ourselves up to date on what the status of the file was.

Q. Why did you have to know what the contents of the file was if all you wanted to do was to get a renewal signed? A. Well, because we have a policy we always follow of reviewing any file on any situation before we go into negotiations on it.

Q. Well, there was no negotiation on the file, was there, further than renewing? A. We wanted to freshen our minds, Mr. Leahy. We had a [1557] lot of things on our minds besides the question of the Webster Motor Car Company.

Q. You didn't even bring the contract you wanted renewed with you? A. No.

Q. What terms was it? A. The terms were the standard terms being offered to all dealers as of that year.

Q. You never saw that contract, did you, that was offered? A. No, sir.

Q. Then how do you know what it had? A. Well, I assumed that it had—that it was written in the standard manner. It is a printed form, Mr. Leahy.

Q. I know it is printed. We just showed you one, didn't we? A. No, I don't think you did. You showed me the golden anniversary——

Q. Didn't I show you the agreement? A. You showed me the golden anniversary agreement. You have not shown me the amendment.

Q. No. Have you ever seen the amendment? A. Yes, I wrote it.

Q. You wrote the amendment that was to be submitted? A. For all dealers, yes, sir.

[1558] Q. Were they all the same? A. Yes, sir, except for the name of the dealer. Other data that may have been in it, as I recall it—I would have to refresh my memory—there were other fill-in spaces in it. I prepared the standard form.

Q. Did you prepare the agreement with the July 1 termination? A. No, sir.

Q. Who did? A. The zone.

Q. Did you instruct how it should be prepared? A. We did.

Q. And you gave instructions that it should be changed from the standard agreement, didn't you? A. We did.

Q. Why did you do that? A. Well, in order to use the standard form of agreement with the standard terms and conditions terminating on July 1, we had to X out or mark out with pen the expiration date of March 31, 1953, and write in by pen or typewriter, I don't know how they did it. We instructed them to write in the date of July 1, and to have both parties initial it at the side of the agreement. I never did see the agreement.

Q. You never did see what? A. I never did see the form of extension agreement [1559] that was actually prepared.

Q. Was that the only difference in the July 1 termination agreement, the date? A. That would have been the only difference.

Q. You are quite sure about that? A. Yes. Other than for any changes, Mr. Leahy. As I say, I don't—have you got a copy in front of you there? If you will let me look at it, I can tell you whether there would be other changes. There might have been changes with regard to the officers, or with regard to working capital. I don't remember what other fill-in spaces there were on it on this date. I haven't seen it, sir.

Q. Well, you dictated it, didn't you? A. I wrote it at the time for all dealers, but I don't remember. If you show it to me I can tell you whether or not there were other changes.

Q. You wouldn't have to do that. The thing would speak for itself. A. Yes.

Q. Don't you remember telling Mr. Beck to see if you can't get Mr. Webster to sign the contract with the July 1st termination date by offering to take back his parts? A. No, sir, I think there was a provision in the standard agreement for all dealers which changed between '51-'52 and the '52-'53 contract. [1560] In the earlier contract there were more restricted provisions with regards to the return of parts and accessories and termination. However, I did not take that into consideration so far as the signing of the renewal agreement was concerned. I have heard it mentioned by Beck. But it wasn't mentioned as between us and Beck.

Q. Did you know that was put into the new agreement? A. Certainly I know it was put in all agreements for all dealers in the United States.

Q. Was it typed in? A. It was printed, and it was a standard liberalization of our policy between the '52 and '53 contracts.

Q. Did Beck report to you what he said on April 3rd at Deal Island following your instructions? A. Yes, I believe he did. I don't know how many reports he made.

Q. You have got one of them in front of you, haven't you? A. Yes, sir.

Q. What's the date on that? A. April 7th.

Q. What does he say he told Webster? A. He says:

> "We told Webster that on the basis of our previous contact on February 13, 1952 we had made certain [1561] commitments, and that we expected him to liquidate his Packard business and to terminate his Packard franchise. Dick stated that if there were no alternative he would be forced to abide by this decision."

Q. What does that mean? A. Just what it says, I guess.

Q. Just what it says, that they expected him to terminate by July 1? A. That's what he states.

Q. And that Mr. Webster stated, "Well, if there is nothing else I can do I will have to abide by it."? A. That is the report made by Beck.

Q. Didn't you talk with him on the telephone on that? A. I may have.

[1562] Q. Do you remember of his saying anything to you that Mr. Webster, when he heard that news which you have just read, said, It's a bad day for Packard and it's a bad day for the public? A. No, sir, I don't remember that.

Q. You don't remember that?—because there was no change in the Zell organization today from what it was in '37 and '38? A. No, sir. And I have not said that we agreed with the statement made by Mr. Beck that you have just had me read.

Q. All right. You don't agree with that, do you? A. No, sir, because we had given him instructions to make a new agreement.

The Court: Please answer questions and then stop. Don't keep on going beyond the confines of the question.

The Witness: No.

By Mr. Leahy:

Q. Now, take the fourth paragraph and read it to the jury and see what he told Mr. Webster.

* * *

[1563] A. (Reading): "We were very specific in pointing out to Dick Webster so that there could be no doubt about his understanding that it was the full intention of the Packard Motor Car Company that he should liquidate his Packard business in Baltimore."

By Mr. Leahy:

Q. You talked with Mr. Beck before he went down to Deal Island, didn't you? A. Yes, sir.

Q. Did Mr. Abernethy also, to your knowledge? A. We talked to him on the same phone, as I recall it.

Q. So you both were anxious to see to it, weren't you, that this July 1st date should be signed? A. No, sir. We had suggested that he extend it for a year. The July 1st date was his idea.

Q. I now show you Exhibit 37, Plaintiffs' Exhibit, and ask whose idea was expressed in the handwriting on that. A. Roy Abernethy.

Q. Now, Mr. Abernethy's idea was what? A. Read that to the jury. [1564] A. Mr. Abernethy said he instructed him to try and get an amendment of that date.

Q. What date? A. 7/1/52.

Q. Does it say anything, and if he refused to give him a year? A. This doesn't purport to be a general memorandum.

Q. Just say what it says, never mind what you think it purports to be. You tell us what it is. A. No, it doesn't.

Q. Nothing said about the year, is there? Do you recall when was the first time that you submitted a contract of renewal for a full year? A. Well, it was several weeks after the contract had been submitted with the July 1st date.

Q. Why did you have to get Mr. Zell's consent to all this? A. We didn't get Mr. Zell's consent to anything.

Q. Didn't Mr. Fenn go to Baltimore on February 29th and get Mr. Zell's consent to it? A. No, sir, he did not. He went down there for the specific purpose——

Q. Well, you weren't there, were you? A. Well, all right; then don't ask me the question. I can only report what was reported to me, and I [1565] presumed that is what you were asking.

Q. And Mr. Fenn did not report to you, did he, that Mr. Zell consented to all this? A. He might have. I believe he did write a memorandum on it.

Q. Well, why did you say that you didn't know whether he had Zell's consent or not? A. I said we did not send him down to get Mr. Zell's consent. We sent him down for an exactly opposite reason, for finding out whether or not Beck had made any agreement with Zell.

Q. Let's get the chronology of this straight. February 14th we have a letter written by Mr. Beck to Mr. Webster; that's right, isn't it? A. Yes.

Q. February 20th you get a letter from Mr. Webster regarding that letter of February 14th of Mr. Beck's, don't you? A. We got all three of them. We got all three of the letters together.

Q. And you got all three of them sometime in February, didn't you? A. Yes, sir.

Q. You immediately took it up with your counsel? A. Yes, sir.

[1566] Q. Your counsel advised that there was perhaps a year's commitment in the letter of February 14th? A. No, sir, they didn't advise there was a year's commitment. They advised there was a commitment, as I recall it, to continue at least until July 1st.

Q. To continue until at least July 1st? A. Yes, sir.

Q. And on February 29th you sent Fenn to Zell, didn't you? A. That's right.

Q. And on March 3rd Mr. Beck reports to you that he had had a talk on March 1st with Mr. Donald Webster; isn't that right? A. Well, it's a little hard for me to keep that chronology straight, Mr. Leahy.

Q. Do you remember of getting a report from Mr. Beck on Donald Webster's telephone call? A. Yes, I think we did.

Q. That sharpened up the notion, didn't it, that there might be a lawsuit? A. We were apprehensive of a lawsuit based on the letter that had been written by Mr. Marshall Beck—a lawsuit for damages for breach of contract.

Q. But Fenn's report, as I understand it, didn't in any way relate to going to Zell to find out if Zell would [1567] approve giving it? A. No, sir.

Q. When was it Mr. Zell found out, prior to March 21st, that you were going to renew? A. That we were going to renew——

Q. Or might possibly have to renew? A. As I recall it, Fenn reported that he had told Zell that we were going to renew the Webster contract.

Q. Oh, he told you that right after he came back? A. As I say, as I recall his written report contained something to that effect.

Q. Did he tell you right after February 29th? A. You have the report there, haven't you?

Q. Well, can't you remember it? Never mind what I have. A. That is not my memory.

Q. So he did tell immediately on his visit of February 29, 1952, Mr. Zell that you might have to renew Mr. Webster? A. Apparently he did.

Q. And Mr. Zell consented, didn't he? A. I have forgot the wording that he used. You have the letter.

Q. All right. Let's see if we can refresh your recollection. I now show you a letter dated March 21, which you [1568] have already seen three times, the one with the little writing on the corner that you just read to us. (Handing exhibit to the witness.) Do you remember that? A. Yes. When you showed that to me before I was looking at the memorandum and not at the letter.

Q. Well, of course, you saw that a couple of days ago, didn't you? A. Yes, I have seen it.

Q. I thought so. A. But I didn't memorize it.

Q. I didn't ask you if you memorized that. Take a look at that April 1st, a memorandum written by you. Did you write it? A. Yes, sir.

Q. To whom? A. To Mr. Abernethy.

Q. What was there in that memorandum that you feared to the point where you said, "Destroy it"? A. Well, it might have been an admission on our part that we recognized a contract obligation, an obligation to make a contract, to Webster Motor Car Company.

Q. What difference did all that make if you hadn't made any commitments to Zell? A. Because the zone had treated it as the termination [1569] of March 31st, and it was our opinion we might have gotten a suit for breach of contract from Webster.

Q. You already had advised with your lawyers? A. Yes, sir.

Q. And you already had found it out? A. Yes, sir, at about the time the memorandum was written.

Q. What? A. We had found it out, we had taken it to the attorneys about the time or prior to the time that memorandum was written.

Q. And Mr. Fenn had been down to Baltimore and got Zell's consent, hadn't he? A. No, sir, he hadn't got Zell's consent. I have stated that before.

Q. Now, you wrote the letter, didn't you, of June 11th, which was forwarded? You have seen this I am showing you, Plaintiffs' Exhibit 98, haven't you (handing exhibit to the witness)—that isn't the one I wanted. While I am looking for that, take a look at Plaintiffs' Exhibit 98 and see Mr. Briggs' addition there. Have you finished that? A. Yes, sir.

Q. Did he or did he not consent? [1570] A. He states that he did, although I don't know what his use of language there that "he agreed to" would mean.

Q. You don't know what "agreed to" means? A. Well, the way we are used to using that term "agreed" not as you lawyers use it, but merely that a discussion has

taken place and an understanding of what the events were. I doubt very seriously—I am going beyond the question—pardon me.

Q. Who advised you about how the lawyers use the words "agreed to"? A. Because I am a contact man with our lawyers and I have heard the word used quite frequently.

Q. Was that the explanation you were advised to make when asked that question? A. No, I wasn't advised about any explanation to make on any question.

Q. April 29, 1952 (reading):—

> "As you know, we have authorized Marshall Beck to renew the Webster Motor Car Company's contract for another year. This particular situation was reviewed in detail."

Is there anything unusual about the phrase "in detail" to you? A. No, sir.

Q. (Reading):—"It was reviewed in detail and [1571] agreed to by Mr. Sidney Zell, our other Baltimore dealer, Mr. Briggs." Now, don't you remember Mr. Briggs arriving at this conclusion? A. No, sir.

Q. Don't you remember taking it up with Mr. Sidney Zell? A. No, sir. I did not take anything up with Mr. Sidney Zell, except once.

Q. When was that once? A. That once was sometime in June.

Q. Why did you take it up then? A. I called him on the telephone.

Q. I know you did, but why did you? A. At the instruction of Mr. Briggs.

Q. What did Mr. Briggs say was the reason for calling Mr. Zell, to let Mr. Zell know what you were doing with

Mr. Webster? A. No, sir, that wasn't the reason I [illegible] him. He had written a letter to Mr. Briggs and I called him in answer to the letter he had written to Mr. Briggs.

Q. What letter is that? Do you know? A. You have it in evidence some place.

Q. Just tell us what it was, please. A. I can't without looking at it. It was a letter [1572] from Zell to Briggs.

Q. About what? A. He was asking for some kind of a commitment from Packard Motor Car Company with regard to his being a single dealer, but inasmuch as you have the document that will show it.

Q. How do you know I have it? A. Because I have seen it in the counsel file.

Q. And you have read it too, haven't you? A. I have.

Q. Before you took the stand? A. No, not before I took the stand. I have read it in the past days.

Q. When is the last time you saw that letter? A. Oh, several days ago, probably.

Q. About five minutes ago, wasn't it? A. It may be; it may be.

Q. Take a look-see. A. No; no.

Q. You didn't know anything about that letter, did you? A. No, this isn't the letter I am talking about.

Q. Well, the letter you are talking about might be of May 14th. Was it? A. I don't know without seeing it.

[1573] Q. I will show you Exhibit 41, May 14th; is that the letter (handing the exhibit to the witness)? A. No, I don't believe so.

Q. Well, what other letter was it? A. Well, I can't answer you. Let me look at that again.

Q. Look it over carefully. A. I beg your pardon, that is the letter, because it has my handwriting at the top of it, and the telephone number.

Q. Is that the only thing that causes you to remember that is the letter, because it has your telephone number on it? A. I have seen so many documents, Mr. Leahy, that I am not sure that there weren't more than one letter, but I remember because it has my handwriting at the top of it and the telephone number.

Q. Which is your telephone number? A. Hamstead-7281 is in my handwriting.

Q. Do you know who put that other number up there? A. No, sir.

Q. Don't you know it is a Baltimore telephone number, Mulberry? A. I said I don't know what telephone number it is. I know the Hamstead number is one I wrote on the [1574] top of the letter.

Q. Does that appear to be the number you called Mr. Zell at? A. No, sir. Hamstead 7281 is the telephone number I called him at.

* * *

[1575] Q. And do you think at the time that you did talk to him you then made a memorandum of what you discussed with him for Mr. Briggs? A. Yes, sir.

Q. I will show you what is Exhibit No. 42, and ask you if that is a memorandum which you wrote? A. Yes, sir.

Q. At that time, is that right? A. Yes, sir.

Q. Do you recall when the telephone call was made? A. You mean at what time of the day?

Q. What date? [1576] A. No, sir, I think it is indicated in the memorandum, isn't it?

Q. I will show you the memorandum again. A. I didn't look at it.

Q. And also the letter. The memorandum, Exhibit 42, and the letter, No. 41. A. My memorandum states that:

"I informed Mr. Zell by telephone today——" It is dated June 10th.

The Court: Now just a moment. Just confine yourself to the question.

By Mr. Leahy:

Q. I am reading now from No. 41—— When was the letter, dated May 14, 1952, Zell to Briggs, first brought to your attention? A. On the same day that I telephoned.

Q. What were the directions, if you received any? A. Yes, I received directions from Mr. Briggs to call Mr. Zell and to tell Mr. Zell we could make no commitments to him of any kind.

Q. That who could make no commitments? A. Packard Motor Car Company.

Q. Is that what you told him? A. Yes, sir.

* * *

[1578] Q. Then you sent on a report of what the conversation was to Mr. Briggs, didn't you? A. Yes, sir.

Q. And he endorsed on it "June 17, 1952. Thank you for this report. C. E. Briggs." A. Yes, sir.

Q. So Zell was then complaining about DeBaugh having a sign up, wasn't he? A. That was the first time that——

Q. Did he? Yes or no. Did he complain? A. Yes, sir.

Q. Yes. Then you took immediate steps, didn't you, to have it removed? A. Yes, sir.

Q. Yes. Why? A. Well, because we had had numerous instances in the past where terminated dealers kept their signs up, occasionally sold automobiles. The customer who bought the automobile expected to get his warranty service on the automobile. We do not give warranty

service on a car that is sold by anybody other than an authorized Packard dealer. And yet in those [1579] instances we felt obligated to give warranty service even though the car had not been sold by a dealer because it was sold in a place of business with a Packard sign up. And we felt we had a responsibility to get a Packard sign down in justice to the public to get a Packard car from that dealer.

Q. And you told us that you had authorized DeBaugh to sell cars from Zell? A. I didn't.

Q. Somebody had in your organization? A. According to the information I have heard during the course of the trial, but I knew nothing about it at the time.

Q. You didn't know about it before that? A. No, sir, my first knowledge came from Sidney Zell.

Q. Why was it necessary for you to listen to Sidney Zell's contention that there should not be a sign up from DeBaugh? A. A common business courtesy. He was informing me of a situation that I had not previously been conversant with.

Q. Common business courtesy, was it, to advise Zell too that you had just told Webster that he would just have that number of days? A. He asked me what the status of the Webster contract was, and I told him what the status of the contract was.

Q. You called him to tell him that, didn't you? [1580] A. No, sir, I did not. I called him up in answer to his letter in which he requested some kind of a commitment from Packard. I called him up to tell him Packard could not make such a commitment.

Q. Why didn't you report it? A. I did.

Q. Why does it say that "I called him up to say that he had no commitment."? A. I wrote the memorandum in accordance with the sequence that was in my mind.

Q. Well, the sequence was you had just gotten directions from your superior officer to do something? A. I did.

Q. And you wrote and didn't tell him—you told him a lot of correlated stuff? A. I said in the memorandum that you just read: "Mr. Zell was entirely satisfied and understands that it is not policy for us to give him the letter requested in his letter of May 14, 1952." That was the reason that I called him, outlined in my second paragraph.

* * *

[1582] Q. Why wasn't it policy to write a letter to Mr. Zell? A. To write what kind of a letter to Mr. Zell?

Q. The letter you just mentioned. A. A letter indicating that we would make him the sole dealer in Baltimore at some time in the future? Because we make no such commitments. We make no side agreements with any dealer.

Q. Did we say anything about Zell ever asking for a letter extending his time? A. He asked for some kind of a commitment.

Q. Now, Mr. Armstrong, you knew well enough what he asked for, didn't you? A. You have his letter there.

Q. Now wait just a minute. Take a look at the 21st. I want your answer to the question as to whether or not you don't know what kind of a letter you are referring to in the memorandum you wrote on June 10? A. Well, I assume he was referring to a letter committing ourselves to making him the sole dealer in Baltimore.

* * *

[1586] Do you know what Mr. Zell referred to as the verbal agreement made? A. No, sir.

Q. No, sir? Is that right? A. That's right.

Q. Do you know what he means, that he should have some evidence of good faith from Packard? A. No, sir.

Q. Do you know what he meant when he said that he hoped that Fenn would explore every means at his command to bring the situation to the earliest possible conclusion? A. Mr. Fenn had no authority to make any commitments.

Q. Do you know what he referred to? A. No, sir, I don't. He wrote the letter.

The Court: Mr. Leahy, to whom was the letter addressed?

Mr. Leahy: This letter was addressed to Fenn, and came to the witness' attention and also to Mr. Abernethy and Mr. Briggs.

By Mr. Leahy:

Q. Of course, you recall the letter very well, don't you? A. Yes, sir, I recall the letter.

Q. And you discussed it among yourselves, didn't you? A. Yes, sir, I presume we did. I don't specifically——

[1587] Q. What did he mean when he said, I presume that the Legal Department will frown on the suggestion that I get some written assurance of your good faith? A. Because I presume he was acquainted with the fact that we do not make any side agreement.

Q. Is there any side agreement when you are sure you are making something in good faith, what you say you are going to do? A. The entire agreement is contained in the dealers sales agreement. That is the primary principle of our operation.

Q. This was an entirely different matter from the normal agreement, the franchise? A. I said, we make no side agreements with any dealer.

Q. You never have given any dealer any written assurance, is that right? A. That's correct.

Q. What? A. That's correct.

Q. Is that still your policy too? A. Yes, sir.

Q. Haven't you made agreements in writing of assurances to Mr. Zell since then? A. Not that I know of. Do you mean with regard to being a single dealer in Baltimore? He is a single dealer [1588] in Baltimore.

Q. With regard to the operation of his business as a single dealer in Baltimore? A. Well, if you have any documents that you can show me to refresh my memory—I don't recall any.

* * *

Q. Did you know about this letter of May 14th before it was handed to you on June 10th? A. No, sir, I don't believe so. I believe Mr. Briggs gave it to me and requested me to act on it, and I acted on it immediately.

Q. Did Mr. Briggs tell you what kind of a letter it was that Mr. Zell was asking to receive? A. No, I don't believe he did. He called me in his office and handed me the letter. As a matter of fact, my [1589] memory is that he was working on something else at the time and called me in his office and handed me the letter and said, "Armie, please call Zell and tell him we won't give him any kind of agreement. It is not our policy." I called him and told him that.

Q. You mean an agreement about a letter? A. Any kind of a commitment. He was asking for some kind of a commitment. I called him on the telephone to tell him we could make no commitment.

Q. Commit him about what? A. I don't think he specifically indicated what kind of a letter he wanted from us.

Q. Do you mean to say now that you called Mr. Zell on June 10th at Hempstead 7281 just merely to say to Mr. Zell, I have been authorized by—whoever it was who authorized you—Briggs—to call you up and say you can't make any commitment? Period. A. No, sir, I called him and

said, I am calling you with reference to your letter of whatever date that is to Clare Briggs.

Q. The letter reads:

* * *

[1590] Q. I think you told us you didn't know what the phrase "I know that Legal Department will frown on this" meant. A. No, I didn't. Naturally, I don't know. He knows. He wrote it. You are asking me to suppose—I would suppose that he was perfectly well aware of the fact that we don't make side agreements.

The Court: We have been over that just a few minutes ago.

By Mr. Leahy:

Q. Is that the reason that you asked that Mr. [1591] Abernethy would destroy this memorandum, Exhibit No. 110? A. Mr. Leahy, that memorandum was written considerably before that, wasn't it?

[1592] Q. Well, never mind when it was written. You know when it was written? A. Certainly I know when it was written.

Q. Is that the reason why you asked that it be destroyed? A. Is what the reason?

Q. Well, you give us the reason why you asked it to be destroyed. A. I told you before the reason I asked for it to be destroyed was because I had a feeling that the memorandum I had written was an acknowledgment on Packard's part in writing that we had an obligation to renew the Webster contract for an additional period after March 31st, and I was afraid that it might be later used

in evidence in an action for a breach of contract. That's why I wanted it destroyed.

* * *

[1595] Q. Would you look at Exhibit 107 now and see when it was that Packard re-signed for the year 1952-53, Zell Motor Company A. C. M. Porter states as of 3/27/52 that the Zell agreement was signed.

Q. You don't know anything about that, however, outside of that? A. No, sir.

Q. I am showing you Exhibit 48, a report again from Mr. Beck to Mr. Roy Abernethy. By the way where was his office with relation to yours? A. Next door.

Q. Do you recall having seen that report? A. (Reading.)

The Court: Well, you are merely asked whether you have seen it before or not.

[1596] The Witness: Your Honor, these reports are all on the same type of form and I have to read it to determine. Yes, I have seen it before.

By Mr. Leahy:

Q. You saw it a couple of days ago, didn't you? A. Yes.

Q. Surely. Have I shown you a single thing today that your lawyers haven't shown you about two days ago? A. I don't believe so.

Q. Do you know what Mr. Beck refers to when he says: "Our understanding with Mr. Zell is that we will eliminate the Webster Motor Car Company when we can do it on a legally sound basis with absolutely no stipulation as to when this can be accomplished." Do you know what he meant by that? A. No, sir, I do not.

Q. Did you ask him when you received this report? A. I don't recall whether we did or not.

Q. You remember reading it, don't you? A. Yes, I remember having seen it. There were a lot of documents in there, Mr. Leahy.

Q. That's all right; you remember having seen it? A. Yes.

The Court: I think the important thing is whether he saw it contemporaneously.

[1597] *By Mr. Leahy*:

Q. Well, you saw that contemporaneously, didn't you? A. I don't know; I assume I did, because I saw practically everything that came in on the situation after it became a current problem. I don't specifically remember that letter, but I assume I did.

Q. Isn't it true that there wasn't a step taken in this matter without first having it taken up with you? A. I think that Roy Abernethy and I discussed practically every new additional piece of paper or——

Q. Were you discussing how you could eliminate Webster on a legally sound basis? A. No, sir.

Q. You don't know what that refers to at all? A. We had concluded, Mr. Leahy, that——

Q. (interposing) That's all right; you have answered the question.

* * *

[1598] Q. Fenn and Beck told Mr. Zell that they did not want to lose him; it was necessary that Packard hang on and he, Zell, hang on until the expiration of that date.

Mr. Denit: We object to this line of interrogation. [1599] Mr Leahy is acting as the witness.

The Court: What are you reading from?

Mr. Leahy: I am reading from a deposition, if Your Honor please. I want to see if he remembers that.

The Court: Whose deposition?

Mr. Leahy: Mr. Zell's.

The Court: Well, I am going to sustain the objection because I think a witness may be confronted with his own prior statements, but not with somebody else's prior statement.

Mr. Leahy: I was asking if Fenn reported that to him, if Your Honor please. Fenn did report, he said.

* * *

By Mr. Leahy:

* * *

Q Do you recall of having dictated this particular [1600] memorandum, and I am showing you now Plaintiffs' Exhibit No. 21 (handing exhibit to witness). A. Yes, sir, I do.

Q. When did you dictate that? A. Well, I believe it was on June 11.

Q. When did you last see that? A. During the course of preparation for this trial.

Q. And how recently? A. The last several days.

Q. Did you have advice of counsel on the dictation of that? A. Yes, sir. Counsel wrote the memorandum.

Q. And you merely read to Mr. Beck over the telephone what counsel had written; isn't that right? A. I had counsel on one telephone and Beck on the other, and counsel dictated to me and I dictated to Beck.

* * *

[1601] Q. Exhibit 21. And that was a memorandum which was to be sent to counsel for Mr. Webster in reply to their letter dated June 11, 1952, Plaintiffs' Exhibit No. 20; isn't that right? A. I believe so.

Q. Is it, isn't it, in fact? A. I said I believed so.

Q. Well, you know so, don't you? Didn't Mr. Beck call you up on the telephone and read to you Exhibit 20, which was Mr. Webster's counsel's letter? A. Yes.

Q. And then you put Mr. Beck on the telephone with counsel and yourself? A. No, sir. I called counsel and talked to counsel at the same time I talked to Mr. Beck.

* * *

[1603] (At the bench:)

The Court: Gentlemen, we have taken quite a bit of time with this case, and I hope we can bring it to a conclusion. I am going to repeat something I said before. I haven't yet seen a single disputed fact in this case. There is a dispute as to the inferences to be drawn, as to the legality of things done, but I haven't yet seen a single disputed fact. And for a case in which there isn't a single disputed fact, the trial has taken too long.

Mr. Leahy: I agree. I am probably responsible for some of it, Your Honor, but——

The Court: I don't——

Mr. Barker: Who spent the most time on the record?

The Court: Of course, some of the matters on cross-examination could be reserved for final argument to the jury. I think a lot of these facts should have been stipulated. I think the whole story could have been stipulated, and the only testimony that would have been necessary would have been on the

issue of damages. I don't mean that that's the only dispute in the case, but the facts are not in dispute. What is in dispute is the inferences to be drawn from the facts, and the legality of what was done.

* * *

[1609] *Redirect Examination by Mr. Denit:*

Q. Yesterday plaintiffs' counsel was examining you concerning Plaintiffs' Exhibit No. 110, being a memorandum which you identified as in your handwriting, and which was made by you on the date it is dated, namely, March 1, 1951. At the time of the making of that memorandum, had there been any indication to you from any source whatever that Webster Motor Car Company was planning a suit against Packard Motor Car Company for alleged violation of the antitrust laws? A. No, sir.

Q. Had there been any intimation from any source that a lawsuit was in contemplation? A. No, sir.

Q. By Webster? A. No, sir.

Q. What did you think might be the effect of that statement from you, a company official, with respect to a [1610] possible lawsuit for breach of contract? A. I felt that I did not have the authority to decide what the company's position might be, or to prejudice the company's position in the case of a possible lawsuit for breach of contract.

Q. And therefore this memorandum was to your superior as a matter of confidential information to him, is that correct? A. Yes, sir, it was.

* * *

[1615] Mr. Denit: Invoices for the purchase of new cars beginning with 4/10/52 and ending September 10, 1952.

The Court: I want to make this suggestion to counsel. I think there is testimony undisputed that a certain number of cars were bought during that period at dealer's prices. I think it would be just encumbering the record to put in all these invoices, Mr. Denit.

Mr. Denit: What we offer these for is to show the course of dealing, and that the parties continued to deal——

The Court: Yes, but that is all testified to.

Mr. Denit: No, that isn't stipulated, Your Honor, and that isn't admitted.

The Court: Very well. I am not going to let you take time to read them.

Mr. Denit: We don't intend to, no, sir.

[1616] The Court: Very well.

The Deputy Clerk: Defendants' Exhibit No. 39.

(Invoices for purchase of new cars beginning with 4/10/52 and ending 9/10/52 were marked and received in evidence as Defendants' Exhibit No. 39.)

The Court: After all, somebody may have to pay for a record in this case later on, and you don't want to encumber it. I don't think either side should encumber the record.

Mr. Denit: We would be perfectly willing to join in a stipulation that from a given date to a given date Webster continued to purchase as a dealer, and Packard sold as a dealer——

The Court: There was testimony to that effect, and that is undisputed.

* * *

[1620] The Court: How much more have you, Mr. Denit?

Mr. Denit: About six or eight of them.

The Court: All right. I think these are all unnecessary, but it takes less time to admit them than to——

Mr. Denit: I am sorry that Your Honor feels that way about it. Particularly, in view of the fact that the jury can't possibly know the details of the continuing deal, without looking at these papers.

The Court: But there is such a thing as overtrying a case, you know. You may proceed.

[1621] Mr. Denit: Could we offer them at recess and let the clerk number them at that time and save the time?

The Court: No, sir. Let's proceed. At recess the reporters have to get a little respite too, so we will proceed.

* * *

[1626] J. HOWARD ERTSGAARD was called as a witness by the defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Denit:

Q. Will you state your full name, please, and will you spell it for the reporter? A. J. Howard Ertsgaard. The last name is spelled E-r-t-s-g-a-a-r-d.

The Court: Would you mind spelling it again?

The Witness: E-r-t-s-g-a-a-r-d.

The Court: And your first name, sir?

The Witness: J. Howard.

By Mr. Denit:

Q. Where do you live? [1627] A. I live in South Bend, Indiana.

Q. How old are you? A. Forty-four.

Q. In what business are you engaged? A. Presently employed by the Studebaker-Packard Corporation, in the business management department, as manager of dealer accounting and statistics.

Q. Are you also an accountant? A. Yes, sir.

Q. How long have you been employed by Studebaker-Packard? A. Since 1947.

Q. Prior to that had you been engaged in the automotive business? A. No, sir.

Q. What duties do you perform? A. Analysis of dealer's financial statements, preparation of various comparative data from these statements; reports to management to the field.

Q. What dealer statements do you refer to? A. Statements submitted by Studebaker and Packard dealers.

Q. Is that pursuant to the contract between the dealers and Packard? A. Yes, sir.

[1628] Q. What function do you serve with reference to those statements? A. In the section which I supervise we prepare analyses of these statements; review them for possible errors in calculation; summarize them for the purpose of furnishing management with reports of dealer progress, and also to determine from those statements those dealers that might be having a problem as to expenses or profits, in which case we, through our field organization, will attempt to assist the dealer to overcome any out-of-line condition.

Q. To what extent are those statements relied upon by Packard in connection with its relations with its dealers? A. We rely on them 100 per cent in preparing these lists, unless we find some that are definitely out of line.

Q. In addition to dealer reports, are there other reports submitted to the factory from time to time by the zone? A. Yes.

Q. In what form? A. In the form of lists of dealers that are losing money; lists of dealers who are under minimum working capital requirements.

Q. Are they in composite form? A. They are, yes.

Q. Mr. Ertsgaard, have you made a study of dealer [1629] financial statements and zone composite reports for the eastern sales division of Packard? A. I have.

Q. And does that cover the period from 1950 through 1954? A. It did.

Q. Did you make a schedule showing the result of your study? A. Yes, sir.

Q. For each year? A. Each year.

Q. What criteria did you use in making your study? A. Well, as you mentioned, these dealers are from the eastern division of the United States. They had to have a sales potential of 150 or more cars per year. They must have submitted complete financial information during the years of 1951, '52, '53, and '54. They had to have new car annual sales of between 100 and 150 cars during the years 1951, '52, '53, and '54.

Q. Why was that selection made? A. To show what dealers in this area had done in the way of profits during those years; the trend of profits during those years.

Q. Why were dealers with sales of 100 to 150 cars [1630] selected? A. Mr. Webster's sales during that period, based on the financial statement, were 125 cars in 1950; 113 cars in 1951. For that reason, in order to get a fair comparison of the operation of dealers of approximately the same size, we used those particular stipulations, allowing a variation of a few cars more than he delivered, and of dealers with a few cars less than he delivered.

Q. You omitted the year 1950. A. The year 1950 was used because if we had confined those three stipulations merely to the year of 1951, there would have been fewer dealers on the comparison. Therefore, any dealer who did not deliver between 100 and 150 cars in 1951, but did in 1950, and complied with the other requirements, we included them in order to have more dealers on the comparison.

Q. Did that give you a fairer comparison of Webster's performance? A. Yes, sir.

Q. I show you five schedules beginning in 1950 and consecutively running through 1954, and ask you if these are the schedules that you prepared from the source that you indicated. A. Yes, sir, they are.

[1631] Mr. Denit: Copy has been furnished to opposing counsel, may it please the Court, and we offer these in evidence and ask that they be marked consecutively.

* * *

The Deputy Clerk: Defendants' Exhibits 62-A, 62-B, 62-C, 62-D and 62-E.

[1632] *By Mr. Denit:*

Q. Now, Mr. Ertsgaard, will you take these schedules and indicate—we have three copies here, ladies and gentlemen, and I will pass these around and they may be looked at (handing exhibits to the jury)— Will you take these schedules and indicate to us what they show? A. Each of these schedules headed "Data respecting eastern dealers having sales potential and performance comparable to Webster" lists the location of 23 dealers in this area. It shows their annual sales potential for each of the years 1950 through 1954; their new unit sales; their variable gross profit, total amount and per unit sold; their fixed amount, and per cent of total sales; operating profit; net profit; officers' and owners' profits; and total sales of all [1633] departments. If you will refer to the schedule for

1951—and I start there because as I mentioned before the same dealers are on 1950, but there are several more dealers on the '51, '52, '53 and '54 schedules; out of the 23 dealers shown in the 1951 schedule, there are one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen dealers showing a net profit. Out of the same group of 23 dealers in 1952 there are one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen dealers showing an operating profit.

The Court: May I interrupt you to ask this?

The Witness: Yes, sir.

The Court: You took a certain area and you took dealers having a certain sales potential?

The Witness: Yes, sir.

The Court: Did you take all the dealers in that area having the specified sales potential or did you select certain ones?

The Witness: No, sir, I took all of them.

The Court: You may proceed

A. (Continuing) In 1953, out of this same group of 23 dealers, referring again to the operating profit column, [1634] there are one, two, three, four, five, six dealers showing an operating profit. In 1954, the same group of dealers, there are two dealers showing an operating profit Basically, Counsellor, that is what the five exhibits show

By Mr. Denit:

Q. In the profit columns you have two statements, one operating profit, and one net profit. Is the operating profit before or after taxes? A. The operating profit is before taxes.

Q. And in those two columns you have some figures in black and some figures in red? A. The figures in black indicate a profit, and the figures in red indicate a loss for the year.

The Court: May I ask you this, Mr Witness? I notice that in the 1954 chart, for example, you have at least two instances where there is an operating loss but a net profit. How can there be a net profit if there is an operating loss?

The Witness: On the financial statement, Your Honor, there is a section between operating profit, which really shows the true action of the business, there is a section between there and net profit for miscellaneous income and deductions which may be from an outside source, but for [1635] accounting purposes the dealer keeps on the same set of books.

The Court: Oh, I see.

By Mr. Denit:

Q. Would that be from investments of the dealer? A. It could be from investments, yes.

Q. Or from other activities? A. Or from other activities not directly connected with the operation of the automobile business.

Q. The figure indicated in the column "Net profit" is after taxes?

By the Court:

Q. After taxes? A. After taxes.

Q. Well, then the real test of the status of the business is the operating profit, isn't it? A. The status of the business, yes, sir, it is.

By Mr. Denit:

Q. Now, on Schedule 4, for the year 1954, there were only two dealers in the eastern division who had an operating profit; is that correct? A. That is right.

Q. You understood I was referring to this group of dealers? A. Out of this group of dealers, sir, yes.

[1636] Q. And they were dealers which were considered to be comparable to Webster? A. That is right.

* * *

[1637] *Cross-Examination by Mr. Leahy*:

Q. When was your attention first drawn to the fact that you should make a comparison of profits in dealers in the Eastern Division? A. The latter part of March of this year.

Q. Of course you have been, you said, with Studebaker-Packard since 1947, is that right? A. Yes, sir; that's right.

Q. When was Packard merged, or when did they go in with Studebaker? A. During 1954.

Q. '54. Where did you get the records to make a comparison of Packard's business? A. Studebaker-Packard. The business management department is a corporate function.

* * *

[1638] Q. Didn't somebody tell you to go to these various zone offices? A. No. Counsel informed me that they wanted a comparison of this type.

Q. Oh. Now, who is the counsel that asked for that? A. The attorneys who are handling this.

[1639] Q. Who were they? Name them. A. The individual who asked me?

Q. Yes. A. Mr. Shapiro.

Q. Mr. Shapiro. When did he ask you to do it? A. At the time I stated, I believe, the latter part of March of 1955.

Q. 1955, the latter part of March; is that right? A. Right.

Q. Is that the same Mr. Shapiro who sits at the trial table here? A. That's right.

Q. Did he tell you where to go, to what particular cities? A. No, sir.

Q. How did you get all of the records of 1950, '51, '52, '53 and '54? A. They are kept on file during those periods, during 1950, '51, '52, '53. They were on file in the various zone offices to whom the dealers have submitted the statements.

* * *

[1642] Q. Do you recall now who directed this particular selection of dealers, Allentown, Cleveland, Elizabeth, and so forth? A. This particular selection, sir, resolved from the fact that the request was made for a comparison of dealers fitting into a category having sales and sales potential of approximately the same as Webster.

Q. Describe what you mean by a sales potential. A. Well, each dealer, based on the possible sales in a given area, is assigned a sales potential.

Q. And that's the sole norm you took for comparison, isn't it? A. No, sir.

Q. What else did you take? A. We also required that these dealers submit full and financial information during the years 1950, 1951, '52, '53 and '54, and they must have delivered during the year between 100 and 150 new cars, which was reasonably comparable to the deliveries of Webster during the years 1950 and '51.

Q. What about the area, what did you take into [1643] consideration as the norm for comparison with regard to the area in which the particular dealer was located? A. Further break down than just the Eastern Division.

Q. In your judgment then a man who had a potential of 150 cars in Baltimore, Maryland could be compared with the same potential of 150 cars in Scranton, Pennsylvania, is that right? A. Reasonably so, sir.

Q. You think so? A. Yes.

Q. You didn't take into consideration, did you, the population in the various areas or cities? A. Not in this case, no, sir.

Q. Did you take in the economic growth of the area at all? A. No, sir.

Q. Did you compare, for instance, when you made up this schedule in '50, '51, and so forth, down through the years, Upper Darby, Pennsylvania, as an economic area which was comparable to Baltimore, Maryland? A. No, sir.

Q. Did you take Waterbury, Connecticut, and compare it as an economic area with Baltimore, Maryland? A. No, sir. The only two requirements in making this comparison were the annual sales potential and the [1644] actual new unit sales.

Q. Now, when Mr. Shapiro was asking you to make up this list on just the potential as the number of cars which were assigned to an individual, without regard to a particular city or spot to which he was assigned, did he also ask you to look up the condition of Zell? A. No, sir. He had those statements.

Q. He had them? A. I suppose he did.

Q. Did you have them? A. No, I didn't have them.

* * *

[1645] Q. Now, did Mr. Shapiro when he gave you the request to prepare these schedules, ask you to take into consideration in your computation what might be the effect of

Webster's situation if Zell had gone out of business in 1952? A. No, sir, I made no such a study.

Q. Were you given any such request? A. No, sir.

Q. Are these the only dealers in the sale of Packard cars with these potentials which you have indicated on each of the schedules in the Eastern Division? A. No, sir.

Q. What? A. No, sir.

[1646] Q. Are there others with similar potentials in the Eastern Division which you did not show here? A. In this classification, sir, no, not between 100 and 150 cars. There are no other dealers in the division who complied with the requirements.

Q. What do you mean by "complied with the requirements"? A. Who had deliveries of from 100 to 150 cars, and submitted complete and financial information during these years.

Q. They had to submit complete financial reports under your rules and regulations? A. The contract requires that they submit a financial statement.

Q. Didn't they do it? A. In some cases they didn't, no.

Q. How many instances did you find that dealers who sold between 100 and 150 cars didn't tell you what their financial condition was? A. It is not so much those that did not submit statements, sir, as the break-down in changes of potential quota, and so on and so forth, took them out of that category.

Q. Yes. A. I have a complete listing here in my brief case back to 1949, if you would like to see that.

Q. No, I don't want to go into all that detail. I am [1647] just asking you this: Did you include on these schedules every dealer you thought came within the potential in the Eastern Division of Packard? A. Yes, sir, within the potential, providing he made the required number of sales.

Q. Provided he made the required number of sales? A. Provided his statement showed deliveries between 100 and 150 cars during the years of '50 and '51.

Q. And there is no dealer then of Packard in the Eastern Division which showed between 100 and 150 cars who doesn't appear on these schedules? A. No, because there is one other comment in there, who furnished us with the information or did during that period of all these years, who was in business during all these years, is what I am thinking of. There could have been dealers who met the sales potential in number of sales in 1950 or '51, but who are no longer in business or did not meet these requirements in '52, '53 and '54 that would not be on there.

* * *

[1648] Q. I take it then from '53 and '54 schedules, that in these towns and cities which you have indicated in the lefthand side of the schedule, you had about three dealers, didn't you, who were out of the red in '54? Maybe it's five. On one column I see "net profit." "Operating loss," but a net profit, is that right? A. There are seven in '53. Two in '54.

Q. Two in '54? A. Yes.

Q. Did you have any dealers in the Eastern Division who had a potential of 100 to 150 cars outside of these two or three who did any business or made any profit? A. Who were in operation throughout this entire period according to this, no.

Q. You didn't have one? A. I have included every dealer on here that would fit into this particular category.

* * *

[1649] Q. Well, you restricted your investigation then into the dealers who had 100 to 150 cars, is that right? A. That's right, sir.

Q. And under the instructions or request of Mr. Shapiro—— A. No, Mr. Shapiro's request was that I make a study [1650] of dealers in the Eastern Division to see what the comparison was. That is, to give him a comparison of all the dealers.

Q. Did you take in all of the dealers? A. My original study took in everything that came within, that was comparable to Webster's potential in sales. However, all of those dealers did not continue to report, nor fit into this category through all the years, and consequently it was gradually boiled down until it wound up with this many dealers.

* * *

[1653] Q. Did you take into consideration at all, or did you have any data handed you with regard to the experience of the dealers, for instance, whose names you have in your study? A. Other than what appeared on the financial statement, no.

Q. You didn't know whether any of those dealers had been in business since 1937, did you? A. Since 1937? Continuously?

Q. Yes. A. No.

Q. You didn't go back to see what their prior history was before 1950? A. 1949 was the year I started with.

Q. That is the first year you started? A. Right.

Q. Did you regard at all in your study the question of the salaries and expenses, and all that, to give you an indication as to why these people had not made profits? A. I made no special survey of that, no; no special study of that.

Q. You did, did you, have before you Webster's composite report? [1654] A. At the time that I made these?

Q. Yes. A. No, sir, I didn't.

Q. Do you know, for instance, whether or not Mr. Webster—that is, the Webster Motor Company—had shown that the net worth of that company had constantly increased every single year down through 1951? A. No, I can't say that I did know it, nor that I do.

Q. You never, I take it, personally talked with the management of any of these companies in making the study? A. No, sir.

Q. You just took cold sheets like this (indicating) didn't you? A. If I may see those—I can't tell from here what those are.

Q. Those are the zone composite dealer statements. A. That is for the basis of making these up, yes, sir.

Q. And you weren't given any supporting data at all to these composite sheets? A. No.

* * *

Redirect Examination by Mr. Denit:

[1655] Q. Mr. Ertsgaard, counsel just asked you if you took the zone composite statements in making up your studies. A. I misunderstood him, if that was his question. No, these studies are made actually from the dealers' financial statements. I used the zone composite only in making my original listing to get a basis for it.

Q. And by "dealers' statements," do you mean statements of the character that I show you (handing document to the witness)? A. That is right, yes. This is the form that was used in 1950.

* * *

[1656] Q. Now, I understood you to say that your test for making up the schedules that you have before you was de-

termined as of 1950; is that correct? A. The original selection was 1949, Mr. Denit.

Q. And if a dealer was once put on your list, was he thereafter ever removed? A. You are speaking now of the final schedules, are you, sir?

Q. Yes, sir. A. If he was once put on there as having complied with the stipulations that were set up in the beginning for 1950 or 1951, he was not removed, no.

Q. He was continued on through the schedules? A. That is right.

* * *

[1657] *Recross-Examination by Mr. Leahy*:

Q. Is sales potential on your schedule the same as what we have heard "quota"? A. Yes, sir.

* * *

[1661] Mr. Denit: We also ask for a stipulation from the other side that the plaintiffs' answer to defendants' interrogatory, answer No. 75-A, -B, and -C, be admitted in evidence.

The Court: It may be admitted. That will be considered as part of the record.

[Answers to defendants' Interrogatories Nos. 75a, b and c:

75.a. *Stockholders*:

Webster Motor Car Company (January 1, 1949-December 1, 1954)

Richard C. Webster	1008 shares
Kathryne B. Webster	12 shares

Somerset Realty Company (since incorporation until December 31, 1954)

Richard C. Webster	45 shares
Kathryne B. Webster	45 shares

Donald D. Webster 5 shares
Richard C. Webster, Jr. 5 shares

Somerset Seafood Company (January 1, 1949-December 31, 1954)

Webster Motor Car Company 500 shares

b. *Names of Directors and Officers and Positions Held*:

Webster Motor Car Company (January 1, 1949-about September 1, 1953 at which time Webster ceased all automotive business, discharged all employees, and according to present recollection thereafter conducted no such business. While no official action has been taken to dissolve the Board of Directors, Richard Webster and his wife, Kathryne, have considered that the only directors and officers of Webster after that company withdrew from the automobile business were Richard and Donald Webster)

Officers:

Harry L. French—President
Donald D. Webster—Vice President
Charles E. Thompson—Secretary
George L. Graff—Treasurer

Directors:

Richard C. Webster—Chairman
Harry L. French
Donald D. Webster
George L. Graf

Somerset Realty Company (Since incorporation until December 31, 1954)

Officers:

Richard C. Webster—President
Donald D. Webster—Secretary & Treasurer

Directors:

Richard C. Webster
Donald D. Webster
Kathryne B. Webster

Somerset Seafood Company (January 1, 1949-December 31, 1954)

1949-1950: *Officers & Directors*

Richard C. Webster—President
Kathryne B Webster—Vice President
George L. Graf—Secretary & Treasurer

1951-1952: *Officers & Directors*

Richard C. Webster—Chairman
J. H. Burton—President
H. R. White—Vice President
K. B. Webster—Secretary
D. D. Webster—Assistant Secretary
G. L. Graf—Treasurer
Kirwin Abbott—Assistant Treasurer

1953-Dec. 31, 1954:

Richard C. Webster—President
Donald D. Webster—Vice President
Kathryne B. Webster—Secretary
George L. Graf—Treasurer
Kirwin Abbott—Assistant Treasurer]

* * *

John H. Verkouteren—By Defendants—Direct

JOHN H. VERKOUTEREN was called as a witness by the defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Denit:

Q. Will you please keep your voice up so that all of us can hear you down at this end of the room? State your full name, please, sir. A. John H. Verkouteren.

The Court: How do you spell your name?
The Witness: V-e-r-k-o-u-t-e-r-e-n.
The Court: And your first name?
[1662] The Witness: John.

By Mr. Denit:

Q. Where do you reside? A. At the present time I reside in Annapolis, Maryland, although up to a month ago I have lived in Washington, D. C. for I would say the last 12 or 14 years.

Q. In what business or profession are you engaged? A. Certified public accountant.

Q. Holding a certificate from where? A. The District of Columbia.

Q. Are you engaged in the active practice of accountancy in the District of Columbia? A. I am, sir.

Q. How long have you been so engaged? A. Since 1927.

Q. Do you maintain an office here? A. I do, in the Woodward Building.

Q. Are you engaged alone or in partnership with others? A. I am senior partner of the firm of Verkouteren & Ricketts & Company.

Q. In the practice of your profession, do you have anything to do with the preparation of income tax returns? A. I do.

Q. Federal, District of Columbia, and otherwise? A. I do, sir.

[1663] Q. How long have you advised with clients concerning the preparation of income tax returns?

The Court: I don't think you have to qualify the witness further. If he is a certified public accountant he is qualified.

Mr. Denit: Very well.

By Mr. Denit:

Q. As a certified public accountant, can you tell us whether in arriving at the profit of a business it is proper to include as expense of doing business the salaries of key officers, transportation furnished the officers, and services furnished the officers to assist them in performing the business of the company? A. It is usual and proper.

[1664] Q. Do you know of any instance where in arriving at profits the salaries and other compensation of officers have not been considered as a reduction of income? A. I do not.

Q. Have you made an examination of the condensed statements of profit and loss of Webster Motor Car Company evidenced by Schedule VII or Exhibit 70, 71? A. I have.

Q. Referring now to—have you also examined the corporate income tax returns of Webster Motor Car Company for the years 1951 and 1952, and the corporate income tax returns of the Somerset Seafood Company for 1951 and 1952? A. I don't believe that I examined the Seafood returns for 1951 and '52. I have examined all of the tax returns of the Webster Motor Car Company for the years '49 through '53. I would say that the year 1949, the year 1950, the year '53 were consolidated returns of the Web-

ster Motor Car Company and the Somerset Seafood Company.

Q. I referred a moment ago to Plaintiffs' Exhibits 70 and 71. Have you also examined Plaintiffs' Exhibits 68, 69 and 72? A. They look familiar to me. I would say, yes, I have examined them.

Q. Now, for what purpose did you examine these [1665] exhibits? A. They were examined in order to determine the justification for the loss claimed that is filed in the plaintiffs' brief.

Q. And for what purpose did you examine the corporate income tax returns of the Webster Motor Car Company for the years you have indicated? A. In order to determine whether or not they were in agreement with the profits as stated in these various schedules that you just submitted to me.

Q. Was it also for the purpose of making certain comparisons of the returns and the exhibits? A. That is true.

Q. Now, I show you Defendants' Exhibits 12 and 13, being corporate Federal income tax returns for Somerset Seafood Company for 1951 and 1952. Will you look specifically at Schedule F, being the schedule referring to compensation of officers.

Mr. Leahy: What is the number of that?

The Witness: Schedule E.

By Mr. Denit:

Q. Schedule E? A. Schedule E is compensation of officers. Yes, sir, I have them here before me.

Q. In other words, these returns are not uniform for [1666] each year, I suppose? A. Schedule E on the 1951. I believe it is Schedule E on the 1952.

Q. Is that the same schedule that is indicated as Schedule F on the 1949 Webster return? A. That is correct, sir.

Q. What do those returns indicate with respect to compensation paid to Richard Webster by each of those two companies?

The Court: For what year, Mr. Denit?

Mr. Denit: For '50 and '51.

The Witness: The year 1950 is a consolidated return. The salary paid to Mr. Webster by both companies during that year is $9,350.

The Court: You mean each, or the two together?

The Witness: That is for the two companies. It is a consolidated return.

The Court: Oh, I see. A single salary of $9,000?

The Witness: There were two salaries, sir; one from the one company, and the other from the other company.

The Court: That is what I wanted to know. You said, $9,000. Was it $9,000 from each company, or $9,000 altogether?

The Witness: It is $9,000 altogether. If I had Mr. Webster's individual return, I could give you the break-down.

[1667] The Court: No, no. You answered my question.

By Mr. Denit:

Q. Now look at '51 and '52. A. For the year '51 the salary of Mr. Webster deducted on the motor car company was $13,310.41. On the Somerset Seafood Company the salary deducted was $3,200. For 1952, the salary deducted by the motor car company was $9,352.09, and by the Somerset Seafood Company, $2,850.

Q. Do those returns indicate the amount of time that Mr. Webster devoted to each business? A. I would say they represent to me the amount of time——

Mr. Leahy: I object to what they represent. He asked what the schedules show.

The Court: Yes. I think you should answer the question as asked.

The Witness: The 1952 returns show—I am looking now at the Webster Motor Car Company returns—show that Mr. Webster devoted his full time as chairman of the board. The 1952 return of the Somerset Seafood Company shows that Mr. Webster devoted his full time to that company. The '51 return for the seafood company shows that Mr. Webster devoted his full time to that company, and the 1951 return for the Webster Motor Car Company shows that Mr. Webster devoted his full time to that company.

[1668] *By Mr. Denit*:

Q. Let me direct your attention to Schedule J of Exhibit 5, being the Webster Motor Car Company's income tax return for 1951. There is an item at the bottom of that schedule reading: "Less administrative costs transferred, $2,953." Do you find that entry? A. I have that entry, yes.

Q. What does that indicate to you with respect to whether or not the records of the Webster Motor Car Company and Somerset Seafood Company attempted to segregate the expenses between the two companies? A. The 1951 return of the Webster Motor Car Company indicates that a credit of $29,053 in the form of administrative expenses, indicating that that was a share of expenses orig-

inally applied against the motor car company that should be deducted and applied elsewhere.

Q. Does that indicate anything with respect to apportionment of salaries? A. It would indicate that an apportionment of proper operating expenses——

Q. Does that include salaries? A. That would include salaries and operating expenses, yes.

Q. Was there anything to indicate that there was a [1669] division of the salary paid for him by the two companies? A. It would indicate to me that it was a portion of administrative expenses. It doesn't state here whether or not it is a salary, but it is a portion of administrative expense. It was taken out of the company, but apparently is not responsible for that expense.

Q. Is that true with respect to the salary paid Richard C. Webster? A. Well, it would apply against any administrative salaries, yes.

Q. Now, look at Plaintiffs' Exhibit 70, Schedule VI, on which Richard Webster's direct salary, transportation, social security, insurance, and other personal services are allocated, 20 per cent to the automotive business and 80 per cent to other operations. Does that treatment of those items accord with the actual records and books of account in the Webster Motor Car Company? A. I believe this is Schedule VI, sir—no. This apportionment is not in agreement with the books and records of the Webster Motor Car Company.

Q. What is the effect of that treatment on the profits per books, and hence against the damages claimed in this suit? A. It would increase the profits for those years, and also increase the damages.

[1670] Q. I direct your attention to Schedule V of Plaintiffs' Exhibit 70, and specifically the item "estimated

costs of personal services for Richard C. Webster, transportation furnished, social security, insurance, and other personal services." If personal services of the type listed on this schedule were furnished by the company to its principal officer as personal services, would that be income reportable as income on the officer's individual tax return? A. If these expenses are of a personal nature, I would consider them to be additional compensation to Richard C. Webster.

Q. Why? A. They were paid out by the company, but if they are personal in nature, the company received no business benefits from such payments. Therefore, they are in lieu of salary compensation.

Q. I show you the personal income tax returns of Richard C. Webster, 1950, '51, '52 and '53. I will ask you if any of those items of personal services furnished to him are reported as income in those returns? A. I don't find any such income reported in any of these returns.

Q. I show you the personal income tax return for Richard C. Webster and Kathryne B. Webster for 1949, and ask you to examine that and see if any of those items are [1671] included there? A. They are not.

Q. Look at Schedule V of the exhibit before you, and the item "additions to profit". A. I have the item.

Q. The amount of $3,840.26. A. I have the item. I just question whether or not that amount is correct. There is an amount stated on another schedule of $3,890. But I have the item you speak of.

Q. You mean the payment was $3,840.26, and the recovery was $3,890? A. The recovery appears to be $3,890, but the amount added back which apparently was the disbursement in that year, '51, was $3,840.26.

Q. Now in accordance with the accepted principles of accounting, if the $3,840.26 was paid out in 1951, should it

be charged against the income of the company for that year? A. I would say yes.

Q. And if it was actually recovered in 1953, how should it be treated? A. I would say it would be other income in 1953 under the circumstances as I understand them.

* * *

[1672] Q. With respect to estimating anticipated profits in this case, what is the result of the transfer from 1953 to 1951 in connection with computing damages? A. It increases the 1951 profits in the amount of $3,840.26.

Q. What effect does it have upon the claimed loss? A. I don't know that it affects your loss. It does increase your profit for that year, and naturally it would increase your claimed losses.

Q. We are talking about the claimed loss, the damages claimed in this case. A. It would have a tendency to increase those claims.

Q. By $3,840? A. That's right.

Q. How did Webster treat this item in its 1953 income tax return? A. In the 1953 return he accepted it as other income, and had I prepared that return I would have done likewise.

Q. Now, as a certified public accountant, do you consider the procedure indicated on Schedule V proper to estimate the loss of anticipated profits by Webster Motor Car Company? A. No, I do not. As an accountant I would not prepare [1673] a statement in this form.

Q. Why not? A. For this purpose? I would not attempt to take out any portion of the expenses paid by the Webster Motor Car Company for services presumably rendered to that company.

Q. Why not? A. Well, if the service was rendered to the Packard Motor Car Company—take salary, for example——

Q. You mean Packard or Webster? A. Well, this is the Webster Motor Car Company.

Q. You said Packard. A. I am sorry. I will take that back. If salaries or other expenses were paid by the Webster Motor Car Company, I think they should be treated as deductions, and I think they should remain as deductions. There is no evidence anywhere else that any of these sums have been returned. Therefore, they should be returned as deductions.

Q. Would you be of the same opinion if you were told that it is claimed that Mr. Webster devoted 80 per cent of his time to the seafood business, and only 20 per cent to the automobile business? A. That wouldn't have any bearing upon my opinion, the amount of time that was devoted.

Q. Why not? A. Time is merely one element for which a man is paid. [1674] I have viewed not only this schedule, but other schedules of the plaintiff, and based upon the volume of business, the experience that I believe a man of Mr. Webster's caliber possesses, I don't feel that salaries paid to him are too high. I think they are fair and reasonable. And if the board of directors voted his salary, I think the salaries should stand.

Q. What is the approximate amount which has been allocated as salary for Richard C. Webster in connection with the automotive operations as shown by the schedule? A. Well, are there any particular years, or do you want me to cite them for all years?

Q. Take it for all the years. A. 1946, the amount apportioned to automobile operations on Schedule VI is $3,452.49.

Q. How does that compare to the amount actually paid? A. The amount actually paid in the form of direct salary was $15,450, and including other benefits, a total of $17,262.44.

Q. Now take the next year. A. 1947, the amount charged automobile operations was $3,474.99, against a total salary and benefits of $17,374.94. 1948, salary charged to automotive operations, $3,462.49, as compared with the total of $17,312.44.

The Court: Don't go quite so fast with those [1675] figures, please.

The Witness: I am sorry.

By Mr. Denit:

Q. Will you keep your voice up? I can't hear you distinctly down here. A. 1949, $3,212.49 charged to automotive operations out of a total of $16,062.44. 1950, charged to automotive operations, $2,237.29 of a total of $11,186.44. 1951, $3,029.37 of a total of $15,146.85.

Q. From an examination of the schedules that you have before you and the tax returns of the Webster Motor Car Company, what income or profit was produced for Webster Motor Car Company from sources other than automotive business in 1950 and 1951? A. During the year 1950, Webster Motor Car Company received $497.39 interest, $3,008.90 gained on sale of securities, or a total of $3,505.90.

[1676] *By Mr. Denit*:

Q. How much do the plaintiffs' account indicate it cost Webster Motor Car Company to produce that income? A.

$8,949.15, representing the 80 per cent allocated to Mr. Webster's salary, and also allocated to his other benefits.

Q. What was it in 1951? A. In 1951 the dividends and interest received on securities was $9.60. The cost, according to the accounts of the allocation was $12,117.48.

Q. That means, from your interpretation of those schedules that it cost twelve thousand-odd dollars to produce $9.62? A. That is correct, according to these schedules.

* * *

[1677] Q. Refer now to Schedule VI, Plaintiffs' Exhibit 71, which is a statement of income and expenses by years for the period January 1, 1946, to March 31, 1952. Will you please examine that schedule, with particular reference to net sales, cost of goods sold, gross profit, and operating expense, and operating profit, and tell us whether or not it discloses anything with respect to the kind of a market, that is whether it was a buyer's or a seller's market during the years enumerated?

Mr. Leahy: I object. I don't think he is an expert on that.

The Court: Objection sustained.

[1678] *By Mr. Denit:*

Q. Did you ascertain what it cost to sell the goods referred to there? A. Yes, sir.

The Court: I am sorry; I didn't hear your question.

Mr. Denit: I asked him if he ascertained from the schedule the cost of the goods represented to have been sold there.

The Court: Very well.

A. For the year 1946 the cost of goods sold was 68.55 per cent. For the year 1947 the cost was 72.27 per cent.

By the Court:

Q. Per cent of what? A. Of sales; net sales.

The Court: Oh, I see.

A. (Continuing) For the year 1948 it was 74.53 of net sales. For the year 1949 it was 82.63 per cent of net sales. For the year 1950 it was 81.80 per cent of net sales. For 1951 it was 82.21 per cent, of net sales, and for the three months' period of 1952 it was 80.34 per cent.

Mr. Leahy: You dropped your voice.

[1679] The Witness: I am sorry; for the three months' period of 1952 it was 80.34 per cent of net sales.

By Mr. Denit:

Q. What does it indicate with respect to gross profit during those years? A. The gross profit was decidedly higher during the first three years, and decidedly lower during the following periods.

* * *

[1680] Q. Will you refer to Schedule IV of Plaintiffs' Exhibit No. 71——

The Court: I understand—I want to be corrected if I am wrong, and I may be wrong, of course—but I understand that there is no claim made by the plaintiffs under Schedule IV. That is an alternative to the profits. Is that not so, Mr. Leahy?

Mr. Leahy: That is so, Your Honor.

The Court: So I don't think you need consume any time with Schedule IV.

Mr Denit: May we approach the bench?

The Court: Yes, indeed.

(At the bench:)

[1681] Mr. Denit: My associate, Mr. Barker, calls my attention to the fact that that would be true only with respect to a certain period. Now, if the plaintiff is permitted to claim the unexpired portion of the lease, that is the seven and one-third years, approximately, then I don't understand that that is their position.

The Court: Well, it is my present plan to leave this matter to the jury to determine. Of course, they will have to determine damages as of the date of the tort. The net profits that might have been made is not a measure of damages; it is only something that the jury may consider in determining damages as of the date of the alleged wrong. Now, it is for the jury to determine, if they want to consider that, whether they should consider it for the entire term left of the lease, or less.

Mr. Smith: The plaintiffs' memorandum of law I think shows very clearly that their theory is loss of profits, or in the alternative.

The Court: I am going to charge the jury that loss of profits, of anticipated profits, is only evidence, and is not the measure of damages. In other words, the jury may consider what in their opinion they might have realized if they stayed in business. [1682] I am not going to let the jury do a multiplying operation.

Mr. Shapiro: May I be heard?

The Court: Yes.

Mr. Shapiro: With respect to the leasehold, as I understand the plaintiffs' claim, the leasehold is only an alternative measure.

The Court: Yes, I understand, but they have dropped that. I will let you put all that in. You are only however confusing everybody because the plaintiff practically dropped that.

Mr. Shapiro: Have they dropped that, Your Honor? I didn't understand that.

The Court: Not formally and officially, but I understood they are trying to use as the measure of damages, or as their principal damages, the profits that they might have realized. Is that correct?

Mr. Leahy: Yes.

Mr. Smith: May we have it clear on the record that the plaintiff is not claiming damages for loss of unamortized leasehold?

Mr. Leahy: If they use the measure of profits as the evidence of recovery and on that evidence make up their verdict, we couldn't because it would be amortized over the period of the lease.

[1683] The Court: I think I would be confusing the jury if I referred to that question of an unamortized part of the lease. I wouldn't be helping the jury; I would be confusing them. And my present intention is not to refer to that in my instructions to the jury. While you are here, gentlemen, if I might make a comment. On examining these rather interesting exhibits which the preceding witness prepared, I am wondering why anybody stays in the

automobile business. It seems to me that the only person who makes a living out of the automobile business is the manufacturer, and he makes a very big living.

Mr. Shapiro: And not all the manufacturers, Your Honor.

Mr. Smith: Your Honor, we can show you some that do not.

The Court: Not the Big Three.

Mr. Smith: This is not one of the Big Three.

The Court: No, but I was just wondering whether this is a true cross-section. It can't be.

Mr. Smith: This is not supposed to be a cross-section of dealers. This is Packard dealers comparable to Webster.

The Court: Apparently the only dealers that make a living are dealers that sell cars manufactured by one of the Big Three. That seems to be so. That was more or less facetious on my part.

* * *

[1686] *Direct Examination (Resumed) by Mr. Denit*:

[1687] Q. Mr. Verkouteren, do you have before you Webster's 1953 Federal income tax return, that is the consolidated return for Webster and Seafood? A. Yes, sir, I do have.

Q. Does that return indicate that Webster Motor Car Company owned all of the capital stock of Somerset Seafood Company? A. It does, sir.

Q. Were all of the funds invested in Somerset Seafood Company funds that were advanced by Webster Motor

Car Company? A. To the best of my knowledge, they were.

The Court: What was your answer?

The Witness: To the best of my knowledge, they were.

By Mr. Denit:

Q. And your knowledge about that is based upon what? A. On the balance sheet of both corporations, the Webster Motor Car Company and the Somerset Seafood Company.

Q. What is the amount of profit or loss which is reported by each company in this consolidated return?

* * *

[1688] The Witness: The amount of profit reported by Somerset Seafood Company for the calendar year 1953 was $53,741.64. That indicates a small loss transferred from another 100 per cent owned subsidiary, the Tangier Sound Seafood Company. The loss by Webster Motor Car Company was $53,334.79.

By Mr. Denit:

Q. Is there anything to indicate what that loss consisted of? A. The $53,334.79 loss by Webster Motor Car Company is made up of a leasehold loss in the amount of $22,048.99 and Nash operating loss of $31,285.80. Included in that latter figure there are some dividends, interest, and long term gains that would aggregate approximately $670.

* * *

[1689] Q. What amount of Federal income tax was saved by deducting these losses on the part of the motor car company? A. Sir, there is a schedule prepared on that.

The Court: I am going to ask counsel to come to the bench.

(At the bench:)

The Court: Even though Mr. Leahy has not objected, I am not going to try a tax case here. Naturally, if you bring that out without objection, then Mr. Leahy will have the right to cross examine at length on that tax question. You will have redirect examination which you will be entitled to. I am just going to keep the tax situation out of this case.

Mr. Denit: We don't intend to put it in.

The Court: You just asked the question. I am going to stop it right at the threshold.

Mr. Denit: But we are trying to show that by taking advantage of these tax losses in this way, Webster's statement claim represented by these schedules is not correct.

The Court: You have a perfect right to show that Webster's statement of claim is not correct. I am not going to let you show that as a result of setting up their accounts this way they saved some money on income tax, or perhaps even dealt unfairly with the Government on their income tax, [1690] because that is extraneous. That opens up a new issue, and maybe we will have rebuttal testimony from some other accountants.

Mr. Leahy: That's what it was headed for.

The Court: I am going to exclude that on my own motion sua sponte.

Mr. Denit: What we are trying to show is a loss of Webster Motor Car Company——

The Court: You have a perfect right to show it, but I am going to exclude that last question. I want the reporter to read the last question.

The Reporter (Reading):—"What amount of Federal income tax was saved by deducting these losses on the part of the motor car company?"

The Court: I am going to exclude that question sua sponte.

Mr. Denit: May we make an offer of proof?

The Court: Yes, you may make an offer of proof.

Mr. Denit: We expect to show by this witness that the consolidated return of Webster and Somerset reflected that Somerset had a net profit for its 1953 operations of $53,741.64; that Webster Motor Car Company showed a net loss in 1953 from operation in the automotive business of $31,285.80. The leasehold writeoff of $22,048.99, or a net loss of $53,334.79. [1691] That the consolidated net profit of the two corporations was $406.85. The Federal income tax on $53,741.64 would have been $22,445.65. That the Federal income tax on $406.85 was $122.06, so that there was a net saving in the Federal income tax of $22,323.59.

The Court: A great deal of this offer of proof is not responsive to the question. The Court repeats, it will permit evidence to be introduced showing or tending to show that the alleged net profits were erroneously calculated by the plaintiff. It is excluding only that much evidence as tends to show that some advantage was gained by the plaintiff in respect to his tax liability as a result of this alleged miscalculation.

Mr. Denit: Would Your Honor look at that schedule and indicate to us whether it comes within the purview of your ruling?

The Court: Is this being offered in evidence? I will rule on it now if you wish to offer it in evidence.

Mr. Denit: My difficulty is, I don't know the extent to which your ruling applies. I don't want to repeat questions that were covered by your ruling.

The Court: My ruling would exclude this computation. In other words, my ruling would exclude the heading, and my ruling would exclude the last three lines of this computation. [1692] In other words, I am not going to let you or anyone else bring in a tax situation here. What you are trying to show is that this was some chicanery in the books resulting in a tax saving. Maybe there was some chicanery, but I am not going to try that issue in this case.

Mr. Shapiro: May I speak, Your Honor?

The Court: Yes.

Mr. Shapiro: The purpose of this is not to show that, but to show the actual amount that Webster Motor was out-of-pocket as a result of losses which they claimed.

The Court: Why bring in the tax saving?

Mr. Shapiro: Because they were out-of-pocket less to the extent of that saving.

Mr. Leahy: Do you want us to try the tax case to find out if that is right?

The Court: We are comparing profits before taxes here, and I am going to make both sides adhere to that. I am not going to permit either side to compare profit after taxes.

Mr. Denit: Would Your Honor permit the clerk to mark this exhibit which I have shown to Your Honor and which Your Honor has ruled upon, so that it may be shown——

The Court: Let this be marked for identification. You are offering it in evidence?

Mr. Denit: We are offering it in evidence.

[1693] Mr. Leahy: I will object to it.

The Court: Objection sustained. Let it be marked for identification.

The Deputy Clerk: Defendants' Exhibit No. 78 for Identification.

* * *

[1694] *By Mr. Denit*:

Q. Mr. Verkouteren, you prepared certain schedules, one of which has been marked Defendants' Exhibit for identification No. 78. Did you also prepare these two additional schedules which I now show you? A. I did, sir.

Mr. Denit: If the Court please, may these be marked for identification as Defendants' Exhibits 79 and 80?

The Court: They may be marked.

* * *

By Mr. Denit:

Q. From what sources did you prepare these schedules, Mr. Verkouteren, and will you refer to them by exhibit number instead of by the designation which appears at the top? A. Exhibit No. 78 shows Somerset Seafood operation——

Q. No, just from what source did you prepare them? A. I prepared them from the consolidated income tax return for the year 1953.

[1695] The Court: Speak up, please; don't let your voice go down. Would you repeat your answer?

The Witness: I prepared this from information furnished by the consolidated income tax return for the year 1953.

By Mr. Denit:

Q. And that is the consolidated return of Webster and Seafood? A. That is that return, yes.

Mr. Denit: I understand that all of them come within the purview of Your Honor's ruling, and therefore no further reference will be made to them.

The Court: Very well.

By Mr. Denit:

Q. Did you examine the reserve for amortization of leasehold improvements account on the general ledger of Webster? A. I did, sir.

The Court: I thought we discussed that item at the bench just before the noon recess. And I rather understood—maybe I was wrong—that that item was not being pursued by either side, the amortization matter.

Mr. Denit: May we confer with Your Honor again about that? I am not clear.

[1696] The Court: Well, yes, I think maybe you can save time by another short conference at the bench.

Colloquy

(At the bench:)

The Court: It was my understanding—and I want to be corrected if I am wrong, and perhaps I am wrong—that plaintiff is not going to pursue the matter of the unamortized remainder of the value of the lease as an item of damages.

Mr. Smith: It is in the schedule (indicating).

The Court: Oh, it is in the schedule, I know all that, but it was admitted in the plaintiffs' case in chief that he couldn't have his cake and eat it too. In other words, he couldn't have both a verdict based upon the profits that he might have realized plus the unamortized remainder of the lease. He can have one or the other, and the testimony so shows. It is my understanding that the plaintiff is not going to pursue this item. If I am wrong I want plaintiffs' counsel to say so.

Mr. Leahy: We say it right in there, in Schedule IV, I think, if Your Honor please.

The Court: Yes. And it is not my present intention to refer to that item in my instructions to the jury. I try to avoid anything that would cause confusion in the jury's mind, or possible duplication in the jury's mind.

Mr. Smith: Your Honor, I think it should be made [1697] clear on the record whether plaintiff is withdrawing its claim with regard to unrecovered costs of leasehold improvements. If plaintiff is withdrawing that claim then Schedule IV, on page 61, should be withdrawn and the item of $22,948.99 should be stricken from all other schedules wherever it appears.

The Court: It doesn't appear anywhere else except on Schedule IV.

Mr. Smith: It appears at two places, in the summary of losses and damages claimed on page 56.

The Court: On what schedule?

Mr. Smith: Before the first schedule.

The Court: The only parts of this pamphlet that are in evidence are the schedules. The rest is just argument; that is no part of the record.

Mr. Smith: That summary was not offered?

Mr. Leahy: No—well, wait a minute.

The Court: Oh, page 56 was offered in evidence, but that isn't evidence—oh, yes, yes, you are right, Mr. Smith.

Mr. Leahy: That is in and out on that summary, isn't it?

The Court: Yes; it is in and out. It is in here and then subtracted.

[1698] Mr. Barker: It is in as Exhibit No. 72.

Mr. Smith: Up to the present the plaintiff has presented his claim based on it.

The Court: I will let you go ahead and offer it. It was not my intention to exclude this but to try to shorten this rather complicated damage question by calling attention to the fact that the plaintiff is not asking for a duplication of damages.

Mr. Leahy: We can't get both.

The Court: But what you are trying to show is that he can't get a duplication that he isn't asking for.

Mr. Smith: We want to have it clear on the record that they are not presenting to the jury a claim for the leasehold improvements. If they are, we have to go into it.

The Court: Why, of course, you do.

Mr. Smith: Why can't they state now that they are withdrawing the claim?

The Court: I think you are entirely reasonable, Mr. Smith. You are not basing any claim on Schedule IV?

Mr. Leahy: We assumed that Your Honor would charge the jury that if they give us the profits we could not get anything for the unamortized portion; otherwise we think that is an item of loss.

The Court: Well, I prefer to say nothing about [1699] that item to the jury—I am talking about the profits. I am going to instruct them on the effect that the claim for profits has. In other words, you have got to make an election, not the jury. The election is with the plaintiff and not with the jury.

Mr. Smith: Your Honor, the difficulty is that the evidence on that claim has gone before the jury and is before the jury in schedules, and they will see it if they reexamine the schedules.

The Court: If plaintiff wants to make an election abandoning this item, Schedule IV can be withdrawn. So far as the entries and the summary of losses and damages claimed is concerned, that is perfectly innocuous because in one place it is added and in the next place it is taken out, it is deducted, so it is purely surplusage. The trouble is that accounts are prepared by accountants instead of by sensible people. Now, it is all right when you prepare accounts for other accountants, just like an architect can never prepare a set of plans that the person who is going to use can understand; he always prepares plans for other architects. If this

had not been prepared by a person who was an accountant this amount would have been left out.

Mr. Smith: Will Your Honor instruct the jury to disregard the item?

[1700] The Court: No, I am not going to analyze all these details. I am just going to tell them the total profits. By the way, there is something that has been omitted and I think should be cleared up. I think this is something you can agree on. That $307,000 should mathematically be reduced to present value, as of the date of the tort.

Mr. Leahy: That is under which, Your Honor?

The Court: This summary. This is your sum total of profits for this seven and three-quarter years, but that should be reduced by actuarial tables to present values. You can no doubt agree on what that would be. That is a question of mathematics. You can probably get that overnight.

Mr. Leahy: I will look at it.

The Court: Suppose a concern is making $50,000 a year profit for five years, and you want to anticipate that and collect a lump sum, you don't get $250,000; you get the present value of the $250,000.

Mr. Leahy: I see.

* * *

By Mr. Denit:

Q. Did you examine the purchase journal of Webster [1701] Motor Car Company? A. I did, sir—certain portions of it.

Q. Did you examine those portions of it which dealt with credit for administrative expenses charged by Webster

to Seafood? A. I had allocated, or rather, I had determined, that certain telephone expenses had been allocated during a certain period.

Mr. Leahy: Certain what, sir? I couldn't hear your answer.

The Court: Do keep your voice up, Mr. Witness.

The Witness: I will try to—allocation of certain telephone charges to Somerset Seafood Company.

By Mr. Denit:

Q. Was there any allocation of legal expenses? A. There was an allocation that was brought up earlier while I have been testifying, in the form of an administrative expense. Now, whether that was a legal expense I don't know.

Q. Did you find any allocation of any expense incurred by either company to Donald Webster? A. I don't recall that his name was so shown on the record.

Q. Would you be able, without taking too much time, to find the item on the purchase journal which I am showing you?

* * *

[1702] A. I believe so; the $2,953—I presume that was the correct amount—was a journal entry that was made at the end of the year, and I don't believe it would be in the purchase journal. The purchase journal, however, does show certain allocations of telephone expense.

The Court: Now, Mr. Witness, not all of us are accountants. Try to get away from accountancy terms. I have heard of journal entries, but I am not

quite clear as to what a journal entry is. Suppose you translate your answer into laymen's language. Suppose you were explaining to a client of yours, who is not an accountant?

The Witness: There are two forms of books kept——

The Court: No; translate your answer into nontechnical language.

The Witness: I would say that through this journal [1703] the Somerset Seafood Company had been charged, and the administrative costs of the motor car company had been credited during that particular year. And while I did not examine the books of Seafood I feel reasonably satisfied that had I examined those records I would find——

Mr. Leahy: Oh, I object to that.

The Court: Objection sustained.

By Mr. Denit:

Q. Do you mean by that that Webster spent certain money, or incurred certain expense, that should have been charged to Somerset, and at the end of the year Somerset was charged by transfer entries on the books? Is that it? A. That is correct.

* * *

Q. And in no instance did you find any record of Somerset being charged for any portion of Richard Webster's salary during the year? A. I did not.

* * *

[1704] *Cross-Examination by Mr. Leahy:*

Q. I think there are only a few questions I want to put. I think you were shown in Schedule VI, I believe, or your attention was referred to Schedule VI, an item of $1,000 for transportation. Do you recall that item now, in your memory? A. I do, sir.

Q. That's an item in Schedule VI from 1946 down and through 1951, where there has been charged for transportation each year $1,000. Now, if that charge for transportation relates to transportation which occurred for and on behalf of the motor company, to charge it to the motor company would be perfectly proper and perfectly good accounting, wouldn't it? A. If that were a business expense.

Q. You don't know and weren't supplied with data to determine whether it was a business expense or not, were you? A. The schedule definitely shows that these were not business expenses, and they were personal expenses.

Q. Where does it say that? A. If you will turn to Schedule VI, the top caption reads, "Apportionment of salary paid to and personal services rendered for Richard C. Webster." [1705] If these are personal services they are not business expenses.

Q. I am not referring to your column at all. I told you the column to look at. Will you look at it? Don't you see "Transportation"? A. Yes.

Q. That doesn't say personal services, does it? A. That comes under the personal service heading, sir.

Q. Will you show me a heading in that schedule marked "Personal services"? A. Here it is, right here (indicating).

Q. What does it say? A. "Apportionment of salary paid to and personal services rendered for Richard C. Webster."

Q. Apportionment of salary. A. $1,000 refers to personal services.

Q. What does it say right over the column? A. Transportation.

Q. Why didn't you say so? A. That is one element of personal services.

Q. Whether it is one element of personal services or whether it isn't, if it is on the company's business of Webster Motor Car Company, it is properly accounted for and charged against the motor company, isn't it? A. That is correct, yes.

[1706] Q. And if the other personal services we are talking about were personal services rendered for and on behalf of the motor company, it is good accounting to charge them to the motor company? A. Yes. On the other hand, if they are personal services received by the individual they are reportable by the individual in lieu of salary.

Q. And if they are not personal services rendered to and for the individual, and business in character, he has a right to report them back to the company for which the services were rendered? A. I don't know about the method of these elements of expense.

Q. Then you can't tell whether it is properly charged in Schedule VI or not, can you? A. I am only reading the schedule. They call it personal services. I can only come to one conclusion from that, that personal services mean personal services and not business services for the company.

Q. Didn't you ask about that, what it meant? A. I don't recall that I asked anyone. I just accepted this statement.

Q. Didn't anybody explain to you what that Schedule VI was all about? A. I think it is self-evident.

[1707] Q. Will you answer the question, please? A. No one did, no.

[1708] Q. Let's go to this item I think you had, was it $3,800 or $2,800 which was transferred from one part of a schedule over against the motor company? A. That is the year 1951.

Q. 1951. What was the amount? A. $2,953.

Q. Where does that appear in the schedule, or which schedule? A. It appears as another deduction, Schedule J, attached to the 1951 corporate income tax return, Webster Motor Car Company.

Q. What was it that you stated with regard to that particular item to which objection was made? A. This item of $2,953 represents an apportionment of administrative costs that have been deducted from the expenses of Webster Motor Car Company.

Q. And had it been charged back? A. No. I would say that while the other entry is not shown, it would have to be applied to another account. I don't have the general ledger here, sir.

Q. Do you know what that item was? A. I had been advised, I don't recall who told me, that it represented some of Donald Webster's salary apportionment for certain legal work done, and reference to salvaging a ship loss for the seafood company. But that's merely [1709] hearsay on my part.

Q. Do you think it was bad accounting practice if what you have heard is true to have made an apportionment back to the seafood company? A. I think that is most proper the way they have handled it.

Q. Most proper? A. I wouldn't object to this handling, no.

Q. All right. Thank you. Would you go to that other item, and then I think we are probably about done. $3,800, wasn't it? Let me see, 1951. It is shown, I think, on

Schedule V. Do you happen to have that there before you? A. Yes, sir.

Q. And I think it is marked $3,840.26, 1951? A. That's the George S. May recovery.

Q. Do you find on any schedule where that is taken out? Would you look at Schedule I? A. I am sorry, sir.

Q. Page 57, if you have it. A. I have it, yes, sir.

Q. Do you find that that is deducted from profit under that Schedule No. I? A. It has been, yes.

[1710] Q. Do you happen to have any of the consolidated returns before you there? A. I have them all.

Q. Do you have them? A. '49, '50 and '53.

Q. Could you tell us what the amount of investment of the Webster Motor Company had in this seafood company in whatever year it was? A. December 31, 1953, Webster Motor Car Company had owing to it by the Somerset Seafood Company on open account $100,162.86.

Q. Could you tell us what they had owing—do you have 1950 or '51? A. The '51 return also gives me the '50 information. At the end of 1951, that's December 31st, that amount was $132,343.55.

Q. Do you happen to have the other one, '52, there? A. Well, I have '50 right before me. In 1952 the amount was $126,324.51.

Q. Do you object as an accounting principle to the apportionment of salaries as apportionment of expenses of a business? A. Not as an apportionment of expenses in a business as such, no, but——

Q. That's all.

[1711] Mr. Denit: Have you completed your answer?

The Witness: No, I had not.

Mr. Leahy: Oh, I am sorry, sir.

The Witness: I do, however, object on sound accounting grounds that one corporation cannot pay another corporation's expenses; that Mr. Webster when he was employed by the Webster Motor Car Company, he was employed to look after the Webster Motor Car interests. As far as other securities or other interests than the automotive, he was limited to that as an investor. It did not give him a right to step into the seafood company or some other company and to manage that company or to perform any other services.

The Court: Just a moment. You are going way beyond the question that was asked you.

The Witness: I probably have said too much, sir.

The Court: I don't like to characterize it that way. You are just going beyond the confines of the question.

By Mr. Leahy:

Q. Have you finished your answer? A. Yes, sir.

* * *

[1712] WALTER F. MILLER was called as a witness by the defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Denit:

Q. State your full name, please, sir. A. Walter F. Miller.

The Court: How do you spell your last name?
The Witness: M-i-l-l-e-r.

By Mr. Denit:

Q. Where do you reside? [1713] A. 4504 Westbrook Lane, Kensington, Maryland.

Q. How long have you resided there? A. Approximately three months.

Q. What is your business or profession? A. I am zone business manager of the Studebaker-Packard Corporation in Washington.

Q. How long have you been connected with the Studebaker-Packard Corporation? A. It will be eight years August 4th.

Q. Were you with Studebaker or Packard? A. I was with Studebaker.

Q. Are you also a certified public accountant? A. I am, sir.

Q. Do you hold a certificate or license to practice anywhere? A. State of Minnesota.

Q. When were you admitted? A. I passed the examination November, 1946.

Q. Mr. Miller, at our request, have you prepared schedules giving certain detailed information with respect to the operations of the Webster Motor Car Company, Zell Motor Car Company, the operations of both together, and other statistical information regarding the operations of those dealers? A. Yes, I have.

[1714] Q. In 1950, '51 and '52, and in some instances extending into '53? A. I have, sir.

Q. Did you also prepare a schedule showing sales by Packard dealers other than Zell and Webster to owners with addresses in the city of Baltimore, Baltimore and Howard Counties, from June '52 through 1953? A. I did, sir.

Q. Did you also prepare a schedule showing the average annual automotive profit of Webster Motor Car Company for the years 1950 and 1951? A. I did, sir.

Q. Are the papers which I now show you the schedules that you prepared? A. Yes, these are the schedules I prepared.

Q. From what sources did you prepare these schedules, and I am not talking about individual ones, but generally from what source did you prepare them? A. Generally the schedules were prepared from the financial statements as submitted by Webster Motor Car Company and Zell Motor Car Company to the Packard Motor Car Company, and——

Q. That—— A. Excuse me, Mr. Denit. And various books and records of each, and some information from the Maryland Trade [1715] Association. That's in general where this information came from.

Mr. Denit: We offer these schedules in evidence and ask that they be marked.

* * *

Mr. Leahy: I was just going to ask if you would ask if these are books and records of the Zell Motor Car Company which the witness stated, certain records and books.

By Mr. Denit:

Q. Were they? A. The question was, were these prepared from—I said, yes, they were the schedules that I prepared from certain information from the books and records, financial statements, Webster Motor Car Company, Packard Motor Car Company, and certain basic records plus information from the Maryland Trade Association.

The Court: Did you mention Zell Motor Car Company?

The Witness: Yes, I did.

Mr. Leahy: I object. They are not in evidence.

[1716] Mr. Denit: The financial statements are in evidence.

Mr. Leahy: I am perfectly willing to admit that, yes. I will let him put in anything from our records because I know they are right, but I don't know about the others.

The Court: I didn't understand. Are you interposing any objection?

Mr. Leahy: Yes, I am objecting on the ground that the source to which it went to compile the schedules before Your Honor is not fully before the Court in evidence.

The Court: Well, I think I will apply the same rule that I applied to the plaintiff. The rule is that a summary prepared by a qualified accountant, and this witness of course is a qualified accountant, is admissible, but the original books or papers which these schedules purport to summarize must be available, must be produced and available for the inspection of counsel.

Mr. Denit: Yes, we understood that, Your Honor, that would be the rule followed. I asked him to indicate the sources generally only.

The Court: He did. Now, are those sources here physically available? Will they be made physically available?

Mr. Denit: Yes.

The Court: Are the Zell books there?

Mr. Shapiro: Yes, they are right there.

[1717] Mr. Leahy: And the tax returns?

Mr. Shapiro: The books from which these schedules were prepared.

The Court: I think I will admit these exhibits.

Mr. Leahy: We made a request for the Zell tax returns. I would like to know if they are there.

Mr. Denit: We don't represent Zell, and we have no way of getting them.

Mr. Leahy: Well, you have the books.

* * *

[1719] **The Deputy Clerk**: Defendants' Exhibits 81-A, 81-B, 81-C, 81-D, 81-E, 81-F, 81-G, 81-H, 81-I, and 81-J.

The Court: They may be admitted.

* * *

[1720] *By Mr. Denit*:

Q. Now, Mr. Miller, when we talk about these exhibits, will you keep them in order so that it won't be necessary for the Clerk to rearrange them? A. Yes, sir.

[1721] The Court: Have you got a copy of these?

Mr. Denit: Yes, Your Honor.

The Court: Well, then let the Clerk have the original set and let the witness have a duplicate set. How many sets have you?

Mr. Denit: I think there are four or five sets.

The Court: Give one to the witness, one to Mr. Leahy, and one to the Court, and give the original set to the Clerk so that he can mark them in the meantime.

Mr. Denit: Let them be marked and I will examine the witness with reference to the subject matter of each exhibit, and that will identify it.

The Court: Very well.

Mr. Denit: May some of these sets be passed to the jury so that they may consider them with us?

The Court: Yes.

(The exhibits referred to were passed amongst the jury.)

* * *

By Mr. Denit:

Q. Would you take the schedule entitled "Webster—Average trading loss and variable gross profit per new car [1722] sold, 1950, 1951 and first quarter of 1952"? From what source was that information obtained? A. Financial statements of Webster Motor Car Company for this period.

Q. And they were dealer financial statements required to be filed annually? A. Monthly; as submitted to the motor car company.

Q. What does the schedule disclose with respect to the number of new cars sold in 1950? A. 125 new cars sold in 1950.

Q. What was the average car gross profit? A. $695.41.

Q. What is the average over-allowance? A. Average over-allowance $334.76.

Q. The average used car profit? A. $243.34.

By the Court:

Q. What does "over-allowance" mean? I am not quite clear. A. The over-allowance means the difference between the amount allowed the retail purchaser for his used car as against the estimated value placed on it by the dealer. For instance, you have a used car. The dealer allows you $1,000

in trade. The estimated value is $800. $200 is the over-allowance on that transaction.

[1723] Q. Let me see if I understand this correctly, because some of these terms are trade terms. When you say "average over-allowance of $334.76" do you mean by that that in your opinion Webster allowed too much, gave too great an allowance to his customer on trade-ins? Is that what that means? A. No, I have no opinion on that. This shows the average amount that he over-allowed on these transactions.

Q. But I am trying to ascertain what the over-allowance means. Does that mean he allowed too much on the trade-in? A. In his estimates, sir, yes, sir.

Q. What do you mean "in his estimates"? A. He makes an estimate of the value of the used car he takes in trade, and he places that against the amount of allowance on that used car, and the difference is over-allowance.

Q. In other words, he gave too great an allowance to his customer? A. Yes, sir.

Q. In other words, his profit would have been greater if he hadn't allowed so much on the trade-in; is that it? A. No, sir; that is only part of it, sir.

The Court: Very well; I understand now what you mean.

By Mr. Denit:

[1724] Q. Can you take a specific case and assume that Customer X goes into the Webster Motor Car Company with, we will say, a Chevrolet automobile, and he wants to buy a new Packard? Now, suppose that Mr. Webster allows him $1,000 on his Chevrolet; how does that affect the gross profit that he will have on the sale of the

new Packard, assuming that the new Packard is, say, $2,750? A. I don't follow your question, Mr. Denit.

Q. Can you give us an example so that you won't have to follow any question? A. Yes, sir, Using 1951, on the average new car the gross profit potential, possible, was $835—I rounded that.

Q. That is the figure you use in the second column, second line, is that right? A. Yes, sir.

The Court: Mr. Denit, I am going to ask you a question now. I don't see the relevancy of those first two tables to the issues of this case. We don't want to complicate matters any more than necessary. In many ways it has been complicated already.

Mr. Denit: These all go to the question of public injury.

The Court: Public injury?

Mr. Denit: Yes, sir.

Mr. Leahy: I don't know what that means, if the [1725] Court please. In other words, then, Mr. Webster ought to give away all his business to the public?

Mr. Denit: No, it doesn't mean that at all. It shows the difference in the trading of Webster and Zell by referring to the next schedule.

The Court: Well, you are showing, according to these two tables, that Zell was a closer trader than Webster, is that it? That his over-allowances were smaller than Webster, is that correct?

Mr. Denit: Zell gave more of his profit to the public out of the trade-ins.

The Court: No, not according to this witness' testimony. I may be confused by these accounting terms, because that is outside of my bailiwick, but

according to this table the average over-allowance of Zell is considerably smaller than the average over-allowance of Webster. In other words, Zell allowed less to his customer on trade-in values than Webster, is that correct?

The Witness: No, sir.

The Court: Well, then, suppose you explain that.

The Witness: Yes, sir. It is an interim figure. Now, the dealer actually sells this used car that he placed an estimated value on, and the next line we have [1726] the used car gross profit. Now, that crystallizes his judgment. He over-allowed so much and he finally sold this used car in trade. Then we see what the average trading loss actually was.

The Court: But suppose a customer comes in to buy a new car and he trades in his old car? According to this table—I want to make sure I understand it correctly, because perhaps I do not—according to this table isn't this the inference, that if he had gone to Zell he would have got a small allowance, a smaller allowance than if he had gone to Webster?

The Witness: We can draw the inference, sir, from the last line, which is the amount of profit remaining to the dealer.

The Court: No, I am not talking about that. I am a customer and I would like to trade in my car. I get an over-allowance, over the value of my old car of $140 if I go to Zell, and if I go to Webster I would got an over-allowance of $334. Well, then under those circumstances, wouldn't I have had a better financial deal from Webster at that time than from Zell?

The Witness: That is the estimate, sir, that the dealer put on the comparison of the value of the used car [1727] against the amount allowed. It has to be crystallized when he actually sells it.

The Court: Suppose you answer my question. Here is a customer, John Smith, who wants to buy a Packard car, and he goes to Zell and gets Zell's ideas of terms, and then he goes to Webster and gets Webster's idea of terms, and Zell tells him what he will allow him for his old car, and Webster tells him what he will allow him for his old car. Now your table says that Zell would have over-allowed him $140 more than the value of his used car. Your table says that Webster would have allowed him $334 more than the real value of his used car. Am I correct so far?

The Witness: Yes, sir.

The Court: Doesn't that mean that it would have been to the customer's financial advantage on that particular date to have bought the car from Webster than to have bought it from Zell?

The Witness: No, sir. It depends on the estimated value the dealer puts on that used car.

The Court: I am not interested in that. I am interested in what the advantage is to the customer, according to this table. Doesn't the customer who is trading in an old car get a better deal, better financial deal, from Webster than from Zell?

The Witness: No, sir.

[1728] The Court: Let's go back again. John Smith, a customer, goes to Zell and says, How much will you give me for my old car. He gives them the figure which is $140 more than the car is worth.

The Witness: According to his estimate, yes, sir.

The Court: Is that right?

The Witness: Yes, sir.

The Court: He goes to Webster and says, Well, now, how much will you give me for my old car. And according to this table Webster gives him an amount that is $334 more than the car is worth.

The Witness: According to his estimate, sir.

The Court: You mean that the estimated value might be different by Zell than Webster?

The Witness: Yes, sir.

The Court: If that is so, then of what value is the comparative table?

The Witness: We come to the actual circumstance where we sell the used car that he has taken in trade.

Mr. Leahy: I object. It doesn't show any such thing, if Your Honor please. It is just more of these statistics and figures. That doesn't show what a man gets. It doesn't show the improvements he put on the secondhand car.

The Court: I don't see the relevancy of this.

Mr. Leahy: It doesn't show anything except a lot [1729] of confusion.

Mr. Denit: I think, if Your Honor please——

The Court: These tables are in evidence. You may proceed.

Mr. Denit: We don't like the characterization that these are just a lot of other statistics.

The Court: Well, they are statistics. The word "statistics" is not an opprobrious word, you know.

Mr. Denit: These are the results shown by the figures that Webster and Zell furnished to Packard.

The Court: I understand, but I don't see why anybody should object to the word "statistics." It is a perfectly good English word. It is in the dictionary. It doesn't carry any unpleasant implication.

Mr. Denit: Would Your Honor permit Mr. Miller to go to the blackboard and show exactly how this operation is made?

The Court: Why, yes, indeed, if you want to do that.

The Witness: We will use the 1950——

The Court: Can all the jurors see the blackboard? If not, we will move the blackboard closer.

(The jury made no response.)

The Witness: We will use the 1951 column which represents the average performance of Webster Motor Car Company trading on 113 new Packard sales. [1730] The first figure, average car gross profits, represents the profit margin. We will assume that the sale price is $3,500. He pays the factory a certain sum for the car which is his cost. In this example it is $2,665. Therefore, his gross profit potential on this new car is $835. I rounded $833, sir, to $835.

Mr. Leahy: Might I object at this point, just solely to say that if that's true, the average gross profit doesn't appear to be the same.

Mr. Denit: He is using the example merely to illustrate, Mr. Leahy, and I suggest if you let the witness——

The Court: All he is using is an example to explain the table. Don't let's spend too much time on this, because of course I admitted it. There is

no objection to it, but I doubt the relevancy of those two tables.

The Witness: An individual comes in with a used car His Honor referred to, and Mr. Webster allows him $1,400 on this particular used car. The value that Mr. Webster places on it, $989, is the worth of that car in his estimate. Therefore, he has over-allowed $411. Now, Mr. Webster will sell this used car that cost him $989 according to this example. He sells the automobile and his used car for $1,325. His cost is $989 according to his valuation. Therefore, he [1731] recovers $336 of the over-allowance. His estimate was $411. He actually recovered $336. Therefore, the average trading loss is the difference between the over-allowance and the amount actually recovered, or in this example, $75.

The Court: I would like to interrupt the witness, if I may. This sounds a bit metaphysical to me, and metaphysics too is not an opprobrious word. It seems to me that not knowing anything about accounting, but just what an ordinary person would do, I would say that the way to figure this is to take how much allowance the dealer gives to the customer, and then how much he sells the secondhand car for, and omit all the rest of that.

The Witness: Yes, sir.

The Court: Isn't that the thing to do?

The Witness: That is exactly right. This is the procedure they go through.

The Court: I know specialists in any profession always make things in their own profession complicated.

The Witness: He had an opportunity to make $833 on the average. It was reduced by the net trading average, trading loss of $75, and he came up with $758 on each new car sold.

By Mr. Denit:

Q. What does that represent in the way of the [1732] contribution to the public of his gross profit on the purchase? A. He sacrificed $75.

Q. $75. So that would be the net benefits to the public out of the trading? A. Yes, sir, on the average performance.

Q. Do the same thing with Zell's operation. A. Yes. We can see the comparison of the potential gross profit——

The Court: Suppose you just give us the final result?

The Witness: Yes, sir. Instead of being Webster $758 variable gross profit, Zell is $669, sir, which means he made less on the average, gross profit.

The Court: Anything further?

By Mr. Denit:

Q. What does that mean, that he gave the public on an average? A. $128. This particular year of 1951 he sacrificed that amount of his potential gross profit.

Q. And in the same period what did Webster sacrifice? A. $75.

The Court: We have been over that. Let's move along. Anything further, Mr. Denit?

[1733] Mr. Denit: Sir?

The Court: I think the other tables speak for themselves, and do not require any explanation.

By Mr. Denit:

Q. What is the next schedule that you have in front of you? A. "Webster—used cars taken as trade-ins on new Packard sales, 1950 and 1951."

The Court: Now, it speaks for itself. There is no use in his reading the schedule. If there is anything that's not clear in the schedule, he can explain it, of course.

By Mr. Denit:

Q. What does "others" refer to in column 2 under 1950 and 1951? A. "Others" are used cars taken in trade on new Packard sales which are not Packard makes.

Q. What was the "others per cent of total"?

The Court: That's in the table. There is no use——

By Mr. Denit:

Q. What does that mean, Mr. Miller? A. "Others per cent of total" means the relationship of 303, which is the other trades to total trades of 109.

Q. What is the next schedule you have before you? A. "Zell—used cars."

The Court: No, the tables speak for themselves. [1734] Don't have him read the tables. I am going to apply the parole evidence rule that the documents speak for themselves. Now, if there is anything that requires an explanation, why, he can explain.

By Mr. Denit:

Q. What does the notation on the bottom of the table "Zell—used cars taken as trade-ins others per cent of to-

tal"? A. It refers to the percent of the other used cars taken in trade which are not Packard makes, to the total.

Q. How does that compare with Webster's? A. For what period, sir? We have two years, sir.

Q. '50 and '51. A. In 1950, "others per cent of total" for Webster, 30.3. Zell for 1950, 40.2. 1951, Webster, 30% with other makes. Zell, 36.7 with other makes.

Q. What does it show the percentage of others is in 1953 so far as Zell was concerned? A. 51.5 per cent.

Q. Now, the next schedule refers to Zell and Webster net working capital, 1951, and that shows the net capital per month beginning January and ending December, is that correct? A. Yes, sir.

Q. What was Zell's average working capital? A. $216,540.48.

[1735] Q. And Webster's?

Mr. Leahy: I object. It is all on the card.

The Court: Objection sustained. I don't think it is appropriate to have witnesses read exhibits. The exhibits speak for themselves, and you can argue about it in your summing up.

By Mr. Denit:

Q. Did you prepare an exhibit showing Zell's advertising expenditures in 1951, '52 and '53? A. Other than co-operative, I did, sir.

Q. Is that shown on your schedule? A. Yes, sir.

Q. Which schedule is it? Does it have a number on it? A. No, sir.

Q. Did you prepare——

The Court: He said he prepared all these schedules. You have identified them before, Mr. Denit.

Please don't go over that again. You asked him those questions before you offered these in evidence.

By Mr. Denit:

Q. You prepared a schedule showing the purchase of new cars by DeBaugh in 1950, did you not?

The Court: I am going to exclude that question. It is repetitious. You asked him it before you offered these exhibits, whether he prepared these schedules and he said yes, [1736] Mr. Denit.

By Mr. Denit:

Q. Where did you get the information upon which this schedule is based? A. DeBaugh's financial statements, sir.

Q. Will you turn to the exhibit "Sales by Packard dealers other than Zell and Webster of new Packards to owners with addresses in the city of Baltimore, and Baltimore and Howard Counties, June 1952 through '1953." From what sources did you get the information set forth on that schedule? A. This information came from the daily reports of new vehicles titled in Maryland from the Maryland Trade Association books.

Q. Where did you get the list of dealers? A. From the books and records of the Maryland Trade Association.

Q. Did you have Mr. Russell verify that these persons named as dealers were in fact Packard dealers? A. Yes, sir. Mr. Russell indicated that from the records in the Packard Motor Car Company, these were Packard dealers at the time of the titling of these vehicles.

Q. Do you know personally some of them to be Packard dealers? A. I do from my work that I perform in the Washington Zone.

[1737] Q. Are you able to tell us, Mr. Miller, whether substantially all of these Packard owners, Packard dealers, are in the vicinity of Baltimore? A. Yes, sir.

Q. How many sales are represented on this schedule? A. One hundred and ten.

Q. Did you prepare a schedule of average annual automotive profit for the Webster Motor Car Company for 1950 and '51? A. I did, sir.

Q. From what source, sir, did you obtain the information? A. From the schedule of damages.

Q. That is of the Webster Motor Car Company in this case? A. Yes.

The Court: Any cross examination?

Cross-Examination by Mr. Leahy:

Q. You work for Packard, don't you? A. I do, sir.

Q. How long? A. I have worked for Packard—I have never worked for Packard, sir. I work for the Studebaker-Packard Corporation.

[1738] Q. How long have been working for them? A. For Studebaker-Packard?

Q. Yes. A. Since the effective date of the merger, October 1st.

Q. How long did you work for Studebaker? A. Approximately eight years, August 4th.

Q. You are in the Washington Zone now? A. I am, sir.

Q. How long have you been in the Washington Zone? A. On this current assignment I have been here since April, 1954. I also had a tour of duty in the Washington Zone for Studebaker, from October 1947 until March 1950.

Q. Who asked you to make up this batch of schedules I have here? A. Counsel, sir.

Q. Who? A. Counsel.

Q. What counsel? A. Defendants' counsel.

Q. I beg your pardon? A. The defendants' counsel.

Q. Which one? A. Not any particular one, a group of lawyers.

Q. All of them asked you to do it? A. Yes, sir.

[1739] Q. For what purpose? A. To present it in this case as evidence in this case.

Q. And to present what phase? What did you expect to show by over-allowances and trading loss? A. Sir, I prepared what they asked me to. I didn't intend to show anything.

Q. Well, you succeeded, didn't you? A. I showed the facts as indicated by the books.

Q. Didn't you show also, and weren't you prepared to answer the question put to you that a certain amount of the profit was passed onto the public? A. Well, we could assume if a dealer doesn't keep it, it is passed onto the public, sir.

Q. How do you know whether the dealer kept it or he didn't keep it? A. He has variable gross profit, which is a figure in his books.

Q. Yes. A. That he retains.

Q. That's right. A. And the difference is in his trading loss. He gave it away.

Q. He gave it away. To whom? A. The retail purchaser, sir.

Q. How do you know? [1740] A. It is part of the business.

Q. A part of whose business? A. An automobile dealer to trade——

Q. Don't automobile dealers trade secondhand cars wholesale? A. I don't follow that question.

Mr. Leahy: Ask it again, please.

The Reporter (Reading):—

"Q. Don't automobile dealers trade secondhand cars wholesale?"

The Witness: I don't get the implication of this "trade". Do you mean do they sell cars at wholesale?

By Mr. Leahy:

Q. All right. Do they sell them at wholesale? A. Yes, sir.

Q. Does Zell? A. I am not familiar enough with his organization to tell you.

Q. Even when you were asked to put that answer to this jury about how much he gave away to the public? Didn't you acquaint yourself with Zell's business enough to be able to know that he wholesaled his secondhand cars or not? A. No, sir, I work from the financial results.

Q. Did you work from the financial results to be able to tell that Zell had given his profits away to the public [1741] while Webster didn't? A. No, sir, I reflected the result as depicted on Zell's financial report and Webster's financial report.

The Court: I think we will suspend at this time for the day. I want to say this, though: That I don't——

Mr. Leahy: I wish we could finish the evidence, if Your Honor please. I won't be more than five minutes if they say that he is the last witness.

The Court: Very well. We can go on five minutes more. I do want to say this, however, Mr. Leahy, and I want to say this frankly to both sides: I don't see the relevancy of those two tables to any issue in this case.

Mr. Leahy: I don't either.

By Mr. Leahy:

Q. Did you prepare yourself to answer that question whether or not those dealers you said you had become familiar with in your job at the Washington Zone were in the vicinity of Baltimore? A. In the vicinity, yes, sir. I know the locations of a number of the dealers, sir.

Q. Do you think Hagerstown is in the vicinity of Baltimore? A. It is in, for instance, the Washington Zone, which includes Baltimore and Hagerstown.

[1742] Q. So you call Hagerstown the vicinity of Baltimore, do you? A. Do I? I didn't get that.

Q. Yes, yes, yes. Do you call Hagerstown in the vicinity of Baltimore? A. It is within the same zone.

Q. Is the Eastern Shore of Maryland in the same zone? A. We indicate it in the same zone, Washington Zone, yes.

Q. And North Carolina is in the same zone, isn't it? A. There were exceptions, sir.

Q. Parts of the state are in the same zone? A. That is in the Washington Zone, yes, sir.

Q. Part of West Virginia is in the Washington Zone? A. Yes, sir.

Q. And you call that in the vicinity of Baltimore? A. It is in the same zone.

Q. Will you answer the question? A. Would you state it again, please?

* * *

[1743] Q. That is in the vicinity of Baltimore in your judgment? A. Well, it depends upon the association of the word "vicinity," sir.

Q. Let's skip it. Where is the Motor Service Center located? A. The Motor Service Center was in Westminster, Maryland.

Q. It was, wasn't it? A. Yes, sir.

Q. It isn't any more, is it? A. No, sir.

Q. When did it cease to be? A. I do not know, sir.

[1744] The Court: Mr. Leahy, I don't see the relevancy of that exhibit.

Mr. Leahy: Well, I don't see the relevancy of it, either, if Your Honor please.

The Court: I only let it in because no objection was interposed, and I don't think I ought to exclude exhibits on my own motion.

Mr. Denit: In view of Your Honor's comment, may we indicate to you that these are people who purchased automobiles outside of the Baltimore area but who live in Baltimore, and it indicates that there is competition and that Zell couldn't have gotten a monopoly for Packard automobiles in the city of Baltimore? This number of people in this limited time purchased cars elsewhere.

The Court: I see.

Mr. Leahy: In a year and a half they purchased somewhere in the United States; isn't that true?

By Mr. Leahy:

Q. Do you know how many of these cars were purchased at the Motor Service Center in Westminster? A. No, sir.

Q. Did you know that 62 of the 110 you figured out here in that come from Westminster? A. No, sir, I did not make such a calculation.

[1745] Q. And did you know that the Westminster closed up for the over-allowances and long trades they made? A. I was not familiar with their organization, sir.

Q. You didn't know anything about that? A. No.

Q. Did you know that Covington Motor was just outside the city of Washington? A. I know it is in Bethesda, Maryland.

Q. Did you know that McNey-Kelbaugh is just outside of Washington? A. It is in Washington.

Q. Where is Phillips Hardware Company? A. Cambridge, Maryland.

Q. Do you think that Cambridge, Maryland would be a competitor, a regular competitor, of a dealer in Baltimore? A. No.

Q. Would Havre de Grace, Mr. R. C. Thompson Company, would you consider Havre de Grace a competitor of a dealer in Baltimore? A. We construe it to be in the vicinity and in the Baltimore area.

Q. You do? A. It is in the vicinity.

Q. Do you consider Quillin-Valliant, Salisbury, Maryland, do you consider that a competitor too? [1746] A. No, sir. I made a tabulation, sir, of registrations.

Q. Did you consider that Newton Motors in West Virginia was a competitor of Baltimore? A. No, sir.

Q. Follins Service, at College Park, Maryland, is that competing with Baltimore? A. They made this registration.

Q. Do you consider that in competition with Baltimore? A. No, sir.

Q. Do you consider Erickson-Packard Company, in Riverdale, Maryland, in competition with Baltimore? A. We call it Annapolis, sir.

Q. Annapolis? A. And yet it is listed in the Baltimore advertising for Studebaker.

Q. Studebaker, but do you consider it a Packard competitor? A. I would draw the same analogy, yes.

Q. You would? Hagerstown, Maryland, Coston Motors, would you consider that in competition with a dealer in Baltimore? A. In direct competition?

Q. Yes. A. No, sir.

Q. J. M. Weeks is even outside the state, isn't it? [1747] A. North Carolina.

Q. North Carolina? A. For that registration.

Q. Norman Davis' Son, where is he? A. I do not know.

Q. That's outside the state, isn't it? A. I do not know, sir.

Q. Where is the Rutrough Motors? A. Rutrough Motors is in Roanoke, Virginia, sir.

Q. Do you think that is in competition with Baltimore? A. Not direct competition, no, sir. They, however, made this sale.

Q. Do you know where Follins Service is? A. I call on them. They are in College Park, Maryland, sir.

Q. Do you know where Henry Lawrence is? A. No, sir.

Q. Capitol Motors, do you know where they are? A. Yes, sir, Silver Spring, sir.

Q. Where is Wayne Motors? A. I do not know.

* * *

Redirect Examination by Mr. Denit:

Q. Are all these people who live in or around Baltimore? [1748] A. Their addresses are in Baltimore City, Baltimore County, or Howard County.

* * *

Recross-Examination by Mr. Leahy:

Q. Any evidence as to when they moved into Baltimore? A. No, sir.

* * *

Re-Redirect Examination by Mr. Denit:

Q. What is meant by the composite zone statements? A. The use of dealers' financial statements is to group them into composites so that you can get a general measure of performance of dealers in a similar area, and compare that with the specific operation of one dealer, drawing conclusions as to where he is better or where he is poorer.

Q. And who prepares those statements? A. For Studebaker, which I am more familiar with, it is prepared by the business management division in South Bend. It is merely a tabulation——

The Court: You have answered the question.
The Witness: Yes, sir.

[1749] *By Mr. Denit:*

Q. Which is the basic source of information which you used in making your schedules? A. The basic source of information?

Q. Yes. A. Financial statements as submitted by the dealer to the Packard Motor Car Company.

Q. And as to the dealer's operation, which is the basic source of information? A. As related to the composite, the dealer's financial statement of course is the source of a composite.

* * *

[1753] (At the bench:)

Mr. Smith: May it please the Court, I move that the Court withdraw a juror and declare a mistrial for the following reasons: Yesterday, schedules relied upon by defendants as an important part of their proof on restraint of trade, interference with interstate commerce and public injury were admitted in evidence, without objection, as De-

fendants' Exhibits 81-A to C and E to J (1719-20). These schedules were prepared by Walter F. Miller, a certified public accountant in the employ of Packard (1712-13). Mr. Miller was sworn as a witness to introduce and explain the schedules. We believe that the Court's statements and questioning of the witness in the course of direct and cross examination, including repeated statements to the effect that the Court did not see the relevancy of some of these schedules (1724, 1728, 1730, 1741, 1744), has prejudiced defendants. We believe that the Court's statements as to [1754] relevancy of Exhibits 81-I and J and 81-C had substantially the same effect as if the Court had excluded them from evidence, and were prejudicial. I shall designate portions of the minutes which we believe demonstrate that defendants have been prejudiced. They are:

Lines 23 and 24, page 1723
Line 16, page 1724, to line 19, page 1731
Line 2, page 1733, to line 4, page 1734
Lines 11 to 13, page 1741
Lines 1 to 7, page 1744.

The Court: Motion denied.

Mr. Leahy: Amen.

The Court: I might say this, Mr. Smith, you are in a Federal Court and not a State Court. A Federal judge has a common law power to comment on the evidence.

Mr. Denit: Your Honor, there is one other matter we would like to address ourselves to, if Your Honor please. Yesterday, in the testimony of Mr. Ertsgaard we asked him about the formula or criteria that he used for making up the schedule that was offered through him, and he stated that he used the criteria involving annual sales between 100 and 150 cars during the years 1951, 1952, 1953, and 1954.

Actually the criteria he used were annual sales of between 100 and 150 cars during the year 1950 or 1951. [1755] We have called his attention to his testimony in that respect, and he is prepared to state that he made an error in stating the formula.

The Court: What would you like to do? To recall him to the stand, or do you want to correct it by mutual consent?

Mr. Leahy: I will agree to correct it by mutual consent.

Mr. Denit: Page 1629 of the record, if it could be corrected by mutual consent.

The Court: That is agreeable to the Court.

Mr. Leahy: If you say that, that is agreeable to me.

Mr. Smith: Shouldn't we state how it is corrected?

Mr. Denit: His answer then would be they had to have new car annual sales of between 100 and 150 cars during the year 1950 or 1951.

* * *

[1761] (At the bench:)

Mr. Leahy: In accordance with Your Honor's suggestion of yesterday afternoon with regard to getting an actuarial figure, I thought it would be here. We have tried to get it. It will be in——

The Court: Suppose we proceed. If there is no objection, it may be supplied later, provided it is supplied before the summing up commences.

Mr. Denit: I don't see any reason why we shouldn't agree to that.

Mr. Smith: We will have the opportunity on that occasion to make any objection?

Mr. Leahy: Oh, surely. Oh, yes.

The Court: Of course. I thought actually that perhaps you could stipulate the actuarial figure, because that is a matter of mathematical computation. In other words, without conceding that the plaintiff is entitled to recover any-

thing, all I thought should be supplied is what was the present worth as of such and such a date of the sum total of the anticipated profits that they say they lost.

[1762] Mr. Smith: I am afraid we cannot stipulate on the subject, Your Honor.

The Court: You cannot?

Mr. Smith: No.

The Court: Then I will reopen the case for the taking of testimony. I thought it was just a matter of a mathematical computation. I can take judicial notice of a mathematical computation just like I can take judicial notice of the multiplication table.

Mr. Smith: I want it to be understood that we cannot make any stipulation with respect to damages, or computation of damages, but of course Your Honor can take judicial notice of facts of common knowledge. It may be that when Mr. Leahy wishes to present evidence from any recognized books as to actuary figures, we may have no objection. I am doubtful that it is going to be necessary to produce testimony.

The Court: I doubt so myself.

Mr. Smith: But we cannot enter into stipulation.

* * *

[1763] Mr. Leahy: Could we ask Your Honor what was your plan with regard to arguments today? Were we going on today?

The Court: I should be very glad to have counsel go on today. I might ask you now. I would like to dispose of all the motions first.

Mr. Leahy: All right, Your Honor. Here is a motion I might leave with you. It is just putting it formally in the record. It was a motion for a directed verdict on the issue of liability for the plaintiff.

Colloquy

The Court: I am going to deny the motion. I [1764] think it is a question of fact for the jury.

Mr. Leahy: I agree with Your Honor.

Mr. Smith: May we have a copy, Mr. Leahy?

Mr. Leahy: I am sorry. I have them here for you.

"Plaintiffs' motion for a directed verdict on the issue of liability. In accordance with Rule 50 of the Federal Rules of Civil Procedure, plaintiff at the close of all the evidence moves for a directed verdict in its favor on the issue of liability; and further moves the Court thereafter to submit to the jury only the question of plaintiffs' damages. The grounds for this motion are as follows:

"1. No reasonable man could fail to find that there was an agreement or conspiracy between defendants to unduly restrain or monopolize interstate trade in Packard automobiles, parts, repairs, etcetera, in the Greater Baltimore Area.

"2. Packard's offer to renew Webster's contract for a one year period even if made in good faith does not destroy Packard's liability.

"3. Webster was under no legal duty to accept Packard's offer, whether or not made in good faith, and its refusal so to do in no way affects Packard's liability.

"4. Substantial damages have been shown capable of assessment by the jury."

* * *

[1767] RULING ON MOTION FOR A DIRECTED VERDICT

The Court: Most of the grounds advanced in support of the present motion were advanced in support of the motion made at the conclusion of the plaintiffs' case. The Court adheres to the ruling heretofore made as to those matters, and it would be superfluous to repeat the reasons [1768] that the Court gave at the time. Now, the two additional grounds are: First, that the defendant Packard Motor Car Company and the co-defendants before the Court, have been released by virtue of the order of the United States District Court for the District of Maryland staying a similar action in that court until after the trial of this action, and further providing that upon the termination of this action, whether by settlement or judgment other than for lack of jurisdiction, the action should be dismissed on the merits. It is urged that that constituted a release of Zell Motor Car Company, which was a party in the Maryland action, and which is named as a defendant in this action but has not been served. The Court is of the opinion that that order, first, does not constitute a contract. It is an order of the Court and cannot be construed as a contract or release made by the parties. Second, even if arguendo this order was to be regarded as a contract by virtue of the fact that it was a consent order, the Court is still of the opinion that it does not have the effect of releasing the present defendants. If it is a contract, it is not a release at all; it is a contract to release in futuro on the happening of a certain contingency. Such a contract does not release a [1769] joint tort feasor. Consequently, the Court is of the opinion that this ground for the motion is not well founded. The last ground is that the damages are speculative and conjectural, and therefore there is no basis for a verdict for damages in favor of the plaintiff. Of course, as a matter of procedure, even if this contention were well

founded, it is not a basis for a directed verdict because all that it would mean is that the plaintiff may not recover more than nominal damages, and that would not justify a directed verdict. It might justify a direction to the jury, if they find for the plaintiff they may not award more than nominal damages. However, the Court is of the opinion that within the decisions of the Supreme Court of the United States there is sufficient evidence which, if believed, would justify the jury in finding a verdict for a substantial amount in favor of the plaintiff, if they decide for the plaintiff. In the case of Eastman Kodak Company v. Southern Photo Company, 273, U. S. 259 it was held that loss of anticipated profits from the destruction or interruption of an established business may be considered in connection with determining the amount of damages in a suit for triple damages under the antitrust Acts. In the case of Story Parchment Company v. Patterson Parchment Paper Company, 282 U. S. 555, it was held at page [1770] 563 that the extent of the damage may be shown by approximation. And the Courts have held again and again that if there is some basis for a computation of damages in a tort case the defendant may not take advantage of his own wrong and disclaim any liability and leave the plaintiff without relief merely because the plaintiff cannot establish the amount of damages that he sustained to a mathematical precision. Accordingly, the motion of defendants for a directed verdict is denied. Now, the Court wishes to make an inquiry of plaintiffs' counsel. There are three defendants remaining in the case, as I understand it, the defendant Packard Motor Car Company, the defendant Beck, and who is the third defendant?

Mr. Leahy: Porter, Your Honor.

The Court: Does the plaintiff request the submission of the case to the jury as to all three defendants?

Mr. Leahy: Frankly, if Your Honor please, we do not have any desire to hold the three individual defendants.

The Court: Well, that is what I thought. However, I have to rule according to law, of course.

Mr. Leahy: We have no desire to hold them, but I wouldn't want it argued that there wasn't any evidence against them, but they were acting under instructions, that is pretty clear.

[1771] The Court: Well, I denied the motion to dismiss, and in the light of that it is my duty to submit the issue as to all three defendants. I directed a verdict at the close of the plaintiffs' case as to still a fourth defendant. Of course, the plaintiff has a right to dismiss as to the other defendants.

Mr. Leahy: Couldn't we clear it up by just voluntarily withdrawing?

The Court: You may dismiss as to the individual defendants.

Mr. Leahy: We will do that.

The Court: I suppose it will have to be done with the defendants' consent, but I don't suppose they will object.

Mr. Smith: I understand it is a dismissal as to the individual defendants with prejudice.

Mr. Leahy: Well, we are moving to dismiss it because we don't want to——

Mr. Smith: With prejudice.

The Court: Very well; there is no objection?

Mr. Smith: —so that you cannot sue them again on the same cause of action.

Mr. Leahy: I don't want to become involved in an argument about this "with prejudice." We will dismiss them in this case. I am making no [1772] promise about anything else.

Mr. Smith: I believe that the dismissal must be a dismissal with prejudice, and I don't believe we can consent to a dismissal without prejudice.

The Court: Well, you have a right to decline to consent to a dismissal during the trial, of course, and the case will then have to be submitted to the jury as to all three defendants. The plaintiff moves for leave to dismiss as to the two individual defendants. If you object, the Court will deny leave.

Mr. Smith: May we have a moment to confer?

The Court: Yes, indeed.

Mr. Smith: If Your Honor please, I refer to subparagraph (1) of paragraph (a) of Rule 41 relating to voluntary dismissal. It provides: "Subject to the provisions of Rule 23(c) and of any statute of the United States, an action may be dismissed by the plaintiff without order of Court"——

The Court: Well, I have the rules before me.

Mr. Smith: I merely wish to call attention to the fact that in the last sentence it is stated, "Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice." And we cannot consent to a dismissal without prejudice.

[1773] The Court: You object to leave being granted to dismiss?

Mr. Smith: We object to a dismissal without prejudice. We believe that if there is going to be a dismissal at this stage of the case it should be with prejudice.

The Court: Very well. Motion for leave to dismiss as to the two individual defendants is denied. Are there any requests for instructions?

Mr. Leahy: Yes, Your Honor.

The Court: I will hear the plaintiffs' first and then the defendants'.

* * *

Now, as to plaintiffs' proposed instruction No. 1 I shall grant that in substance. In other words, I will use my own phraseology, but I will grant it in substance.

Mr. Smith: If Your Honor please, may I interrupt? [1774] We object to the granting of plaintiffs' prayer No. 1.

The Court: Very well. Now, as to plaintiffs' prayer No. 2, I am going to deny that. I am going to instruct the jury in place of that, however, that a good motive, or a worthy motive, does not justify an act if it is otherwise illegal.

Mr. Smith: May it please the Court, we object to the proposed instruction which Your Honor has just stated.

The Court: Very well. I am going to deny plaintiffs' prayer No. 3. I think injury to the public is a matter of fact. I am going to deny plaintiffs' prayer No. 4. The reason I am denying these, all these circumstances are circumstances that the jury may consider, but I don't want to instruct the jury on these matters as matters of law. I am going to deny plaintiffs' prayer No. 5. I don't think it is useful to quote judicial opinions in instructions to the jury, because judicial opinions are written for lawyers, and the Court prefers to phrase its instructions, in so far as it is capable of doing so, in language that is clear to the layman. I am going to deny plaintiffs' prayer No. 6 because it goes a little too far, I think. I am going to deny No. 7. Now, I am going to grant No. 8 except the last [1775] sentence of the first paragraph. I am going to strike out the last sentence of the first paragraph, but I am going to give the balance of No. 8, in substance in my own phraseology.

Mr. Smith: May it please the Court, we object to the granting of plaintiffs' prayer No. 8 to the extent indicated.

* * *

[1776] The Court: I am going to deny No. 9 because I think all these are matters for the jury, and I don't want to narrow down the scope of the jury's consideration. I will grant No. 10.

Mr. Smith: We object to the granting of No. 10.

The Court: Very well. I will grant No. 10A.

Mr. Smith: We object to the granting of No. 10A.

The Court: I am going to grant No. 11, but I am going to qualify it by adding the considerations that the jury has a right to weigh in diminution of the amount.

Mr. Smith: We object to the granting of No. 11 to the extent indicated.

The Court: I will grant No. 12.

Mr. Smith: We object to the granting of No. 12

The Court: I am going to deny No. 13. I think that could be argued to the jury rather than being included in the Court's instructions to the jury. I am going to deny No. 14, and the reason I am going to deny No. 14 is this: I am going to instruct the jury in substance that the prospective or anticipated profits that they had reasonable expectation of receiving are not the measure of damages, but merely evidence to be considered in determining the amount of damages. In other words, the damages are the value of the plaintiffs' business as of the [1777] date it was destroyed, if the jury finds it was destroyed, by any wrongful act of the defendants. Now, in determining the value, the jury may consider the profits. In other words, the profits are not the measure of damages at all. They are merely evidence of the value of the business that was destroyed.

Mr. Smith: May it please the Court, we object to the giving of the instruction which Your Honor has just outlined.

The Court: Now, Mr. Denit, have the defense any?

Mr. Denit: Yes, sir.

(Requested instructions by the defendants were handed to the Court.)

* * *

The Court: Defendants' request No. 1 is denied. Do you wish to note objections as I go along?

Mr. Smith: We object to the denial. We do, if it is necessary.

The Court: Very well. I am not saying you should, but if you want to protect your record, you may.

Mr. Smith: We object to the denial of No. 1.

The Court: I will deny No. 2.

Mr. Smith: We object to the denial of No. 2.

The Court: I am going to grant No. 3 in substance. [1778] I am going to use my own phraseology.

Mr. Leahy: May I suggest, if Your Honor please, that as to the word "contract" I take it Your Honor will instruct the jury upon the point that it isn't necessary to be a formal contract.

The Court: Oh, yes. I think No. 4 correctly states what the plaintiffs must prove, and to that extent it correctly states the elements the plaintiffs must establish. I am going to use somewhat different phraseology, and I grant it in substance. I am going to deny No. 5.

Mr. Smith: We object to the denial of No. 5.

The Court: I am going to refer to the subject matter of No. 5, but in a somewhat different way. Now, No. 6, it is my view it correctly states the law. However, if plaintiffs' counsel urge to the contrary, I should be very glad to hear plaintiffs' counsel at this time.

Mr. Leahy: We are all in agreement, if Your Honor please, with this exception: That if we get a monopoly, of course that is per se bad. I believe it is in general and rather broad language, and if Your Honor in instructing

the jury will explain in a little more detail that certain restraints are presumed to be and are unreasonable——

The Court: The only restraint that I know which [1779] is conclusively to be presumed to be unreasonable is the restraint of prices. The Supreme Court has held that every restraint of price is unreasonable. But, of course, we don't have that situation here. No. 7 is denied. I think that is a jury question.

Mr. Smith: We object to the denial of No. 7.

The Court: No. 8 is granted. No. 9 is granted. However, I think I ought to apprise defense counsel of the fact that I am going to qualify this, that while any manufacturer or wholesaler may select his customers, he may not do so as a result of a conspiracy in restraint of trade.

Mr. Smith: We object to the proposed qualification of No. 9.

The Court: Very well. I am going to deny No. 10. I am going to approach this subject in a slightly different way.

Mr. Smith: We object to the denial of No. 10.

The Court: No. 11 is denied.

Mr. Smith: We object to the denial of No. 11.

The Court: No. 12 is denied.

Mr. Smith: We object to the denial of No. 12.

The Court: No. 13 is denied.

Mr. Smith: We object to the denial of No. 13.

The Court: No. 14 is denied.

[1780] Mr. Smith: We object to the denial of No. 14.

The Court: No. 15 is denied, for the reason heretofore stated. I will approach that subject in a different way.

Mr. Smith: We object to the denial of No. 15.

The Court: No. 16 is denied.

Mr. Smith: We object to the denial of No. 16.

Colloquy

The Court: No. 17 is denied, because I don't instruct juries in the negative. I am going to instruct them what the plaintiffs must prove.

Mr. Smith: We object to the denial of No. 17.

The Court: No. 18 is denied.

Mr. Smith: We object to the denial of No. 18.

The Court: No. 19 is granted. I am going to deny No. 20.

Mr. Smith: We object to the denial of No. 20.

The Court: For the reasons heretofore stated. I am going to deny No. 21.

Mr. Smith: We object to the denial of No. 21.

The Court: I am going to deny No. 22. I am going to charge the jury that in effect the loss of anticipated profits is not the measure of damages, but merely evidence as to the value of the business as of the date of its alleged destruction.

Mr. Smith: We object to the denial of No. 22.

[1781] The Court: I will deny No. 23.

Mr. Smith: We object to the denial of No. 23.

The Court: I will deny No. 24. That is a question of fact for the jury.

Mr. Smith: We object to the denial of No. 24.

The Court: I will deny No. 25. That is a question of fact for the jury.

Mr. Smith: We object to the denial of No. 25.

The Court: I will deny No. 26. That is a question of fact for the jury.

Mr. Smith: We object to the denial of No. 26.

The Court: I will deny No. 27. That is a question of fact for the jury.

Mr. Smith: We object to the denial of No. 27.

The Court: I will deny No. 28 for the same reason.

Mr. Smith: We object to the denial of No. 28.

The Court: I will deny No. 29 for the same reason.

Mr. Smith: We object to the denial of No. 29.

The Court: I will deny No. 30.

Mr. Smith: We object to the denial of No. 30.

The Court: I will deny No. 31.

Mr. Smith: We object to the denial of No. 31.

The Court: I will deny No. 32. One reason why I am denying Nos. 31 and 32 is that I do not understand that those claims are going to be pressed.

[1782] Mr. Smith: We object to the denial of No. 32.

The Court: I am going to deny No. 33. Of course, I am going to instruct the jury that they must bring in a verdict for the damages that they find the plaintiff has sustained. The question of multiplication by three is for the Court, and I am not going to mention the subject to the jury. I personally don't think that counsel ought to mention it either.

Mr. Smith: We object to the denial of No. 33.

The Court: I am going to deny No. 34. However, I am going to instruct the jury that a deposition should be given the same weight as oral testimony.

Mr. Smith: We object to the denial of No. 34, and I call Your Honor's attention to the fact that we have filed an affidavit showing that Mr. Beck is sick and could not attend the trial.

The Court: He testified here by deposition, and I am going to instruct the jury that the deposition has the same force and effect as oral testimony.

Mr. Smith: This prayer, however, tells the jury that it may not draw any inference from the fact that Mr. Beck did not testify at the trial.

Mr. Leahy: I am not going to argue that he wasn't physically here, but he certainly testified in the trial because he testified through deposition.

[1783] The Court: Surely.

Mr. Smith: The point is that no inference should be drawn from the fact that he was not present at the trial, to testify in person.

The Court: Lots of people are not present at the trial. I am not going to single out any one individual.

* * *

[1786] OPENING ARGUMENT ON BEHALF OF THE PLAINTIFFS

Mr. Leahy: If Your Honor please, and ladies and gentlemen of the jury: Before entering upon any discussion with regard to the evidence in the case, the nature of it, or what it was introduced to prove, may I express to you for and on behalf of the plaintiff in this case, a sincere thanks for the kind attention which you have shown throughout [1787] the course of this rather arduous and tedious case. It is not easy to sit for a long time, as you have been compelled to do, listening to perhaps the introduction of documents which seem to have no case, no point, and no particular position in the case for any reasonable cause that you can see at the time they are introduced, and to listen to conflicting testimony back and forth with the attention required in order to be able sometime when the Court delivers the case to you for your consideration see just where justice lies. That's really the end for all of us to be here. [1788] We have no other reason—you or I or my good friends on the other side of this case—save and except to do our share and our part in doing what you and I know so well, justice. Now, we

on the plaintiffs' side here have made certain allegations with regard to the conduct of the defendants in this case, by reason whereof we claim that damage and injury have been suffered. We say that course of conduct was perhaps the most stupid that you may ever have to sit and listen to again even though you should act as jurors from this time henceforth until you no longer are capable of sitting on a case; stupidity which persisted from the very beginning of the distinction which was made in the case by the defendant of systems which they would elect to put into effect in order to accomplish an appropriate, or as they called it, a price class percentage and penetration of the market of their particular product, the Packard automobile. You remember the story. The Packard is a big company. It spreads over the United States like a net. Every large place which could with financial success support a dealer, had one to sell Packard cars. And up until the time they ceased the manufacture of cars because of the war, you heard there was a distributorship system in force, in which the distributor was more or less responsible [1789] for procuring dealers under him, in order that Packard might compete with the opposing makes of automobiles, and supply for Packard that particular portion of what it calls price class, that is, successful competition with other makes of automobiles in the particular class in which Packard claimed to be. Then when the war was over, and when once again Packard produced and manufactured cars for public purchase and consumption, they decided to put into effect a zone system. And as Mr. Braden in his deposition told you, the zone included a much wider area than in fact any distributor had within his jurisdiction. For instance, our own Washington Zone, as you heard, comprises Maryland, West Virginia, North Carolina and Virginia, and the District of Columbia, so that our zone

was rather wide in area and included an extensive population. And then it was that the dealership was given directly from the factory itself and not through the distributor. And you will remember Mr. Beck in his deposition told you the reason why. It wasn't for your interest, or my interest, or the public interest, but it was to make a more efficient method of distribution of product by Packard, by having immediately under Packard the control and supervision of dealers, and also to save the expense which Packard, [1790] the manufacturer, lost in the profit which the distributor received by override from the dealers which he had set up under him under the old system. [1791] And, too, they thought, and this is the important thing from the public standpoint, they thought that they could better their position from a competitive standpoint. In other words, it was a stronger system to inaugurate and put in force, from the standpoint of putting muscles, stronger muscles, into the manufacturing end of the business, so that it could compete with more effect and more success against the other makes of cars. You will note one outstanding fact under both systems. Never was Baltimore a sole dealer town. Even when Zell was the distributor he had dealers under him. He gathered in an override from those dealers who were under him. And in a position of supervision and control, he supervised and controlled. Then when they set up the new system, the zone system, and he lost that supervision and control, and he lost the override, the evidence shows that from that day on he continued to try to put himself back again into the situation in which he was before the war. He wanted the override. He wanted the supervision. He wanted the control, and the sole control of the distribution of Packard cars in Metropolitan Baltimore. Now, we are not finding fault with Mr. Zell for that, one bit. Any good business-

man has a right to be [1792] ambitious, hasn't he? He has a right to secure the best bargains he can for himself, hasn't he? He has a right to conduct his business in a manner and fashion which will give him the very greatest returns. We don't have any quarrel about that. That isn't this case. But where we have the right in Zell to do that, we do complain about Zell's teaming up with the manufacturer to prevent another man, who is a dealer, from doing the same things that he has the right to do. We do complain about the fact that Zell at the time laid down the proposition to the manufacturer on occasion after occasion, that he sought Packard to agree to a system under which all of Zell's competition would be eliminated, and he would ride alone as the sole dealer in Baltimore. While we do not complain of his ambition, while we do not complain of his desire successfully to conduct his business, we complain most seriously and violently when he commits acts contrary to what the law permits him to do in order to accomplish a selfish, unjustifiable purpose in the complete destruction of all his competition. That is this case. We have stated the case to you. The burden is on us. We are supposed to satisfy you, as I am sure you experienced jurors know, and have heard it given to you as the law, and it is but repetition to say to you, [1793] that it is our obligation to satisfy you by a fair preponderance of the evidence that what we have said, that Zell together with Packard between themselves agreed and combined to eliminate competition and restrain trade by the elimination of that competition, and to set Zell up as a monopolist, with respect to the distribution of Packards in the Baltimore area, we, with respect to the burden just described, we say we assume it gladly. We will ask you in your consciences to be satisfied that the allegation has been proven, not by anything we said, but right out of the lips of the defendants, right from letters written by the

defendants, and from their own conduct with reference to the allegations which we have made. You need have no concern after the review of this evidence as to whether or not what we have said has been proved, because we do not have to depend upon the plaintiffs. We could have rested upon the defendants themselves from their attempted explanation of this conduct, which I have very graciously dignified as being stupid, over the period of years in which it was done. Now, I said that this man Zell was never satisfied that he had been under his estimation reduced from the sole distributor since, oh, for a period since 1922 he had been the sole distributor in Baltimore. [1794] And then suddenly it was discovered that the factory had determined to put a zone system in force, and that the main office in so far as the sale of Packard cars in metropolitan Baltimore was concerned would be no longer Mr. Zell's office, but would be the zone office here in Washington. And there were set up dealers whom you have heard mentioned: Will Scott; Northwestern Motors; Mr. Webster; Towson; Zell. In other words, as Mr. Braden said, never in the history of Packard's selling cars in Baltimore had it been thought that Baltimore was a one-man town up to the time he finished as the zone manager, which was in 1950. And the history of the sales systems which Packard itself put into effect showed that never in the history of the Packard's manufacture and selling of cars had they considered that Baltimore should be a sole-dealer town. And yet Mr. Zell knew that if he wanted to return to the same position which he had of exclusive monopoly in so far as the direct control of the distribution and sale of cars was concerned, he knew he had to persuade Packard to agree with him on the proposition which ultimately he was going to lay down. And we find him as early as July in 1951—and there is the exhibit (indicating)—

writing to Mr. Beck to ask him what his views were with respect to the number of dealers in Baltimore. [1795] Why was Zell interested in that? Why was Zell concerned to the point that he would write to Beck, the manager of the zone, to find out what his views were with regard to the number of dealers in Baltimore? At that time clearly Schulte was an active dealer. He sold approximately 100 cars. You heard read to you an exhibit in which Zell complained about Schulte having sold 100 cars, because he said 60 per cent of them were his, Zell's, prospects. But when he got into the competitive contest as to which of the two could sell the car, Schulte was able to sell in 60 per cent of the cases the same person whom Zell was trying to sell. That's what we call competition. If therefore he could eliminate Schulte he then would be in position of having gradually begun to do what he ultimately succeeded in accomplishing, to wit, eliminate competition. And so here was the trial letter, the letter of July 19, 1951:

> "At your convenience will you advise me the result of your visit to Baltimore yesterday? We are very anxious to know whether or not you were successful in stopping the damaging advertising by Packard-Schulte in offering officials cars, any model or color, even less than 100 miles, at a discount of $500."

[1796] Mr. Briggs tried to prove to you that Mr. Webster was a bad dealer because he wasn't willing to take less for his used cars just to advance Packard's interest—the manufacturer. Here we have Schulte giving it to the public, $500 off, in the competitive contest as to the sale of cars, and find Zell complaining because Zell, this man whom Mr. Miller tried to convince you yesterday from the witness

stand gave away a certain portion of his profit on the sale of second-hand cars to the public. Here is what Zell thinks about the public—there it is, at a time before any litigation arose, at a time when he didn't think you would be there. Then he asks:

> "Before the model change, which is approximately four months away, will you inform us about your policy with regard to the number of dealers necessary in Baltimore from the factory's viewpoint? From our conversation yesterday you know our definite feelings.
>
> "We shall await your decision before deciding upon our plans but we positively cannot continue much longer constantly operating in the red."

The same story you heard in New York on January 29th, the next year. He was always using the argument that he was [1797] constantly in the red, and yet so far as we know here, and so far as the testimony in this case shows, Zell is still in business. He is the exclusive dealer in the sense that he has the complete monopoly and control, and he is still in the red. How much justification is there in that kind of chatter and talk, when you know what the facts are after they have been developed under the supervision of the Court? There is the beginning of this conspiracy, Beck and Zell together trying to find out a common ground on which they can, No. 1, take the first step, control the number of dealers in Baltimore. Then how does it go? Here is Schulte having difficulty; Zell complaining about him; probably all his competitors complaining about him. It is not an easy contest. It is not an easy matter to be in business today. It is not an easy matter to be in business at any time. Of course, there are difficulties, and Schulte was complaining

about them. In fact, you remember Mr. Beck's testimony that at one time he said he was going out of business, and another time he said he wasn't, until Denholm in one of the reports which he made to the office here at Washington said that he was tired of Schulte's in and out attitude. [1798] But you will notice that the factory did nothing about it. The factory was satisfied to have Schulte as a dealer. In fact, these documents here prove that the factory representatives, both Denholm and Porter, were about inspecting the purchasers of Schulte's business with a view to determine their qualifications as a prospective dealer because the recommendation was that Schulte's dealership should be filled; they should find another dealer who was qualified to act in Schulte's place. That went along. And here for the first time you begin to notice just what the justification is for what has been done in this particular case; the first time you find a suppression of fact from those who have the right to know the facts. Now, a dealer becomes pretty close with his manufacturer. The dealer's livelihood, his business, everything that he has invested, depends upon the factory. They have what they call the sales agreement which I have mentioned so many times. Here was one of them, the anniversary agreement. Thereafter they made amendments to this large agreement. It is written by the factory for the dealer's execution. The dealer executes it, but there is a mutuality of interest, as Braden said, between the factory and the dealer. Why? Because the factory depends for its success [1799] upon the success of the dealer in selling the product, and the dealer in turn depends upon the factory in being fair and honest in its dealings with the dealer. What did we find with Schulte? Here while they are out endeavoring to find someone to take his place, Zell is over at lunch at the Baltimore Club with Beck and with Platfoot, the eastern manager, brought on here to

talk over the situation. And even though one of these is just about a week before as to date in which a recommendation is made that they fill Schulte's place at once, over the lunch table Zell, Platfoot, Beck and Proctor agree to eliminate Schulte and never tell him a thing about it. They all admit Schulte has a good place, that it's a fine shop. What do they care, when once they have already made a determination as to what is going to take place, and they begin on January 11th to accomplish the purpose, and it's completed by June 11th, and all competition is eliminated, and Zell is once more back where he was in 1940, insofar as his financial interests are concerned. And as in 1940 or '41, he didn't care about competition. Now, he need not care about competition because he has none. He and the factory have agreed upon a completely new system, which was absolutely new to the business demands of the Baltimore area; and simply and solely for the purpose, [1800] as they said, of taking Zell out of the red. As Beck told DeBaugh, "You know, we must do something to get Zell out the red." Well, they haven't been able to do it year in and year out. He was in the red all the time, and still is. And to do that, they destroy this plaintiff. And they take from DeBaugh his franchise to do business. I said that the conduct was stupid. It was ruthless. Do you remember hearing Mr. Beck say when he was on the witness stand, Well, it left us with two dealers in Baltimore. And someone reminded him, But you had three, Mr. DeBaugh. Oh, but he was so small. We didn't care about him. Now, I suppose DeBaugh has no feeling. I suppose he has no sense of responsibility for taking care of his son who was in the business there, too, with him. He was just too small. We don't care about that. Let's get rid of him. If he was so small, why did Zell want to destroy him? Why

was it then when even Mr Porter felt the meanness of that, the cheapness and smallness of it. And he said, Well, maybe I can persuade Zell to sell you cars so that you will have something to do. And he went down there. He agreed to sell him cars just the same as he had [1801] sold him cars when he was a distributor. You saw the checks and the evidence come in here where he had to pay $162 more for a car than he had before. What did Zell care? It came out of DeBaugh's pocket and went into his, Zell's, to keep him out of red. He didn't care whether it put DeBaugh or not clear through the red and out into destruction, just as long as he had accomplished his purpose. And so with Webster. What did he care? What did Zell care whether he, Webster, lost all of his investment? Webster, a man who had been so long with the Packard factory that the atmosphere which Webster breathed was Packard atmosphere. He had been their champion salesman over a long period of years until they set up his subdealership under Zell. If any man in any business transaction was entitled to a fair, square, honest statement of what the facts were and the purposes, it was Mr. Webster at this time. But did Zell tell Mr. Webster, or any of his competitors, that he had just succeeded in eliminating Schulte? Did Mr. Platfoot for the factory? Did Mr. Platfoot hesitate to use the word "agree" as Mr. Armstrong objected so much to use when he was on the witness stand? You remember when Mr. Beck was testifying as to what was done, in the deposition which was read to you, and he happened to slip, and when he was asked the question as [1802] to why had you done this, he said, "Because we had agreed to do this with Mr. Zell." Then we adjourned for a little while, you remember, and he came back and he said, I want to correct my testimony. I said, Why? Well, so I can tell exactly what was done. I said, You want

to take out the word "agreed," don't you? He said, Yes. I said, Who asked you to do that? He said, I have been talking with my lawyers. The lawyers will talk to you about that. That is the excuse which Packard has put before you as a defense and justification of its conduct in this case, that it didn't agree to do anything with Zell. It was its own independent decision. They don't like the word "agree." They prefer "decision." Although, you can't make a decision where someone has asked you to do something unless you either agree or disagree, isn't that right? And if the decision is along the line of what you have been asked to do, you have agreed to do it, haven't you? Does Packard expect to fool you? Does it expect that you are going to lay aside all of the everyday business ability which you have and common understanding in discussion and conversation with your fellow men and women, and assume [1803] that unless we can find here a formal written contract under Zell that there is no agreement? Conspirators don't put things in writing. Conspirators don't act in the open. Conspirators don't want anybody to know what they are doing because they know that what they are doing will get them into trouble, and so they try to hide it. That's why it is that in so many conspiracy cases we have to prove it by what they call circumstantial evidence. We have to accumulate the various circumstances, and then you as jurors make an interpretation of the accumulated facts which you have before you. Here you don't have to do that. Were they afraid of what they were doing? Were they trying to conceal from others what they were doing? Do you remember the testimony of Mr. Armstrong, the last one who was on the witness stand to represent the defendants' interests? I showed him a little memorandum of his to Briggs dated March 1, 1952. He

was asked on redirect examination. At the time you wrote that memorandum, had you any knowledge whatsoever from any source that Webster was threatening a lawsuit against you? He said, No. The guilty run when none pursueth. [1804] With no knowledge whatsoever of any trouble that might arise, with no thought that Webster was going to file a suit, he says, we may get a lawsuit out of this thing, but tear this up after you have read it. Does that sound like fair conduct? Does that sound like something which they did out of their own decision to protect their interests? Or does it sound like an agreement which they had entered into, which they knew was violative of the law or might get them into a lawsuit, and not a breach of contract, but a breach of the obligations of citizens with regard to the method and manner by which they conduct their business, and which the Congress of the United States has controlled by saying, Thus far shall ye go but no further, and if you attempt to do it you have violated the antitrust Acts. And why did they do it? They do it to prevent a monopoly in the public interest. They do it because they desire to protect competition, which is the life of trade, which gives you and me and all of us a right to a fair deal in the market place. That is why the antitrust laws are on the books, just to prevent the kind of conduct that you have had disclosed before you here as if you were looking at it on a television screen. And then to say this was all Mr. Don's fault, this smart, brilliant young lawyer, son of Mr. Webster, as if a [1805] son shouldn't help to protect his father's interests if he can. What kind of a son would you think he was, if lawyer that he is, he did not under these circumstances try to prevent his father, engaged in a reasonably small business, yes, from the outrageous destruction which was being wrought upon him by a pet competitor, one who threw parties at which Mr. Briggs, the head of the office, could

attend; one who could go to the Baltimore Club, and there in the quietness and comfort of that club put up these propositions in order to destroy competition. And then even when they write back and forth with each other and the factory, Tear it up, someone may get it. Maybe a lawyer might have it; maybe some day it might be possible to show this to a jury and let a jury of his fellow countrymen see what is being done. We have given you everything we could give you in this case. Mr. Webster has come here and testified. Mr. French, the president, has come here and testified. The smart young lawyer who tried to help his father from destruction has been here and testified. We have brought you every book and paper. We have brought you individual tax returns, not merely of his father but of his mother; of every company with which the motor car [1806] company, in which his father was interested, did business. We have laid everything we have here on this table before you. And the only way we were ever able to get anything to tell you about, so far as Packard is concerned, is because once again the law, the same law that said to Packard and said to Zell, you cannot do this thing without violating the law, gave us the right to ask him some questions. And we asked those questions. And from those answers we got certain information. And we find that remarkably stupid interchange of letters between Zell and the factory in which he completely disclosed his scheme from beginning to end. And the effort on the part of Packard now to give the dignity of a little justification to it is so shattered by the contemporaneous conduct which they performed, and the letters which at that time they wrote, that we could add another adjective now to the picture painting and that is "ridiculous." I told you that Zell was going to destroy the Schulte franchise, and he

did. The date of that was January 11th. Zell then found the Achilles' heel in the Packard business. And he found that he was so strong in the estimation of Packard that Packard didn't want to lose him, because he found there was an economic crisis almost in which he could [1807] be of advantage to him, Mr. Zell, by proposing what he proposed in the January 29th conference in New York. Now, what was that? We didn't know this any more than you did, until the trial here. We didn't know, for instance, that Packard was having difficulties with its dealerships. We didn't know that it was a very expensive thing to change dealerships. We had a hint of it from these reports which we just read, one of which we referred to, that it wasn't so easy to get a dealer because they were out, you remember, talking to prospective purchasers of Schulte in order to qualify them if they could as dealers to take his, Schulte's place, up until the little luncheon in the Baltimore Club. And so Zell says, once again, as he said to them in order to bury the Schulte franchise, I am not going to stay constantly in the red. Well, he had been there long enough to feel perfectly at home in the red, and he has been willing to stay there since he accomplished his purpose. But he said, when he found out that he could destroy the franchise of Schulte, Now I am going the full way and I am going to eliminate all dealers, and I am going to be the sole dealer, and I believe I can accomplish it. And as he sold the proposition to Platfoot in the club in Baltimore, he laid down the same proposition in [1808] New York to all of the top officials of the Packard business. Now, they didn't take it quite so quickly as Platfoot did in Baltimore. You remember Platfoot wrote almost immediately a report to Briggs and said, I agreed with Mr. Zell to do this, and I think I am right.

You remember the language. These officials said, We will take the proposition back to Detroit, and we will consider it and let you know. So that what was done was not done spontaneously or casually or without thought or meditation. It went back to the Packard main office where the main and chief executives deliberated as to what they would do with reference to what Zell asked them to do, for a period of two full weeks—for a period so long that finally Zell called Beck up here in Washington and said, What are you going to do about what I asked you to do in New York? And his excuse for the immediacy and the necessity of the reply was that he had a lease, you remember, that he had to execute a renewal on or say he would not do so, and he could not do this until he learned what was going to happen in so far as the request which he had made was concerned, and Packard's answer thereto. And what did he find out? Mr. Briggs, the man who made the decision, was right there on the witness stand, and what did he say? [1809] He said, I decided to make Baltimore a one-dealer town and he, Zell, would be that one dealer, and I gave instructions not to renew Webster. It was at that point when he was asked, Well, what did you do with DeBaugh—poor little DeBaugh. Yes, he is a small business man, but he had done the best he could. In fact the month before he was 250 per cent of his quota. He had done twice and a half again what he was expected to do. And what did he get? What consideration had he who had been with the Packard for a long period of time? Now, do you want to be assured in your mind as to whether these people were acting on the level, as we say, or not? Take Braden, there was the Packard zone manager of Washington; when there came time and there was a scarcity of cars you remember

Braden said just after the war when they undertook to go into manufacturing once more for the public, they hoped in 1946 and set as the objective of their manufacturing purpose the 200,000 cars and they did only 46,000. And the next year wasn't much better and neither was the next, and when you have learned also that in this great national network of business which this company does that they had only 46,000 cars to be distributed among 1,800 dealers, in a population of 150,000,000, don't you see they were short on supply? Now, take the conduct of a man who is acting on the [1810] level, as we say, and compare it with the conduct of these people throughout in this particular instance. And just recall the testimony of Braden. And he went over to this same little man; it was about in '46 or '47, and he said, I am sorry, we don't have the cars to give you; we are short on supply; we have got the parts; we will supply you with the parts, but hang on, will you hang on, and maybe in a year we can put you back. In a year they got into better production and they put him back. What did this corporation do? Cut his head off. And then when he called up to ask why it was that he was treated in this manner Mr. Beck said, I will send some people over and give you a full explanation. They came over, Mr. Porter and Mr. Howell, and they said that Packard had decided to close up all their little dealers; that it cost just as much to keep a little dealer going as it did a big one, and so they had made this conclusion that they were going to close up the little dealers. And DeBaugh knew that right close by him was Bel Air, and therein was a little dealer who wasn't closed. Did they tell the truth or did they not? Now, if they did not, why did they not? What were they afraid of? Were they afraid of another lawsuit? Was there a ghost somewhere up in that Packard office that was chasing all these [1811] high officials? It continued on and

began as we see here. Compare the conduct of Braden with the conduct of Porter and Howell. And never once have they ever told DeBaugh about the conversation of a month before, or six weeks before, up in New York. Were they going to submit to the proposition, Packard this company, this one of the big independent companies and manufacturers of automobiles in the United States, submitting to this devious, untruthful, unworthy, disreputable line of business conduct with not one of them with the moral courage to come into Mr. DeBaugh and say, Now, listen, this is a matter where we have got to deal with Zell; he is a big dealer; he tells us he is going into volume; he is going to change everything and hire a new force, and he is going over here and put the Packard competition into conflagration and burn everybody up, all opponents in Baltimore, if we make him the sole dealer. Now, we can't afford to lose him, Old Man, and I am sorry, but you have got to go. Didn't tell him anything about that whatsoever until DeBaugh calls up Webster and tells him he has been eliminated. And just the day before almost of that telephone call you have Mr. Webster himself calling Beck here in Washington at his home, on March 31st, the day before the axe was to fall, and asking Beck, please tell him whether he was going to be renewed. [1812] Once more, compare Braden and Beck. Beck's answer was, Dick, I sent your letter to Detroit: Keep pumping water. Now suppose you were a business man who had in good faith 18 months before rebuilt your place of business and invested approximately $100,000 in doing so, in order that you might better represent as a dealer this company with whom you are now talking, and doubt has arisen as to whether the company is going to give back to you your franchise for the coming year. So you call up, nat-

urally being nervous and upset, and you get the answer, "Keep pumping water." Does that sound like a fair line of conduct in which a large concern that is at that time being engaged? Well, you recall the testimony. Zell had only just a month before called up to find out, and the answer came back, We are going along with you. We are going to make the city a one dealer town. And the very same day almost a letter comes from Armstrong with a form letter enclosed, a little short paragraph affair, in which everything is general and nothing is told. And he directs Mr. Beck that when he, Beck, is notifying anybody that they will not be renewed, to use that form of letter. Why? Because it tells nobody anything. [1813] These people had been engaged together in business, DeBaugh and Packard. I don't care how small he is. We have a right to protect the small businessman just as well as we protect the big. We have an obligation of citizenship to see to it that a fair deal is given to the DeBaughs in their life as well as to the Zells. No, he didn't have a racing stable. He didn't have another finance business. He didn't have the money by which he could go and put in such a front as Zell did. But the funny part of it, that little chap was able to make a living, and Zell never has been able to make a living in selling Packards. Zell gets the favors, because somewhere he has the money. He can go to the Baltimore Golf Club and he can entertain. Then it was, you remember, that they are trying to get things going. Do you recall what was said by Briggs? I told them not to renew Webster. "Not to renew Webster" meant not to give him a renewal April 1st. Then you find Zell writing to the factory and being very grateful for the confidence reposed in him, and saying, I'll be ready by April 1. There isn't any one of them who has the courage to stand here in front of an American jury and say, "I know what Zell meant." [1814] Why, you know what Zell meant.

Everybody else knew what Zell meant. He meant he was going to be ready on April 1st to be the sole dealer, that he was making the preparations necessary then in order to comply with the promises he had made for and in consideration of the decision which Detroit would make to agree with him on the proposition he presented in the hotel in New York. And they go down to Dick Webster at Salisbury, the old friend who wanted to be nice to him, Beck, the man whom they had been glad to advertise as their finest master salesman, the man who had been part of the Packard tradition, the man, who of all men in this whole Washington Zone was entitled to fair treatment, they go down to him as they did to DeBaugh. They misrepresent. They conceal. They refuse to be frank. They don't disclose that Zell has put this proposition up to them. They don't tell him that Briggs has just said, There is going to be a one dealership, and Zell is going to be that one dealer. They tell him nothing, but try to cajole him. Cajole him into what? Into what they say was a voluntary surrender of his franchise. For this voluntary surrender of a franchise, did you hear the amazing answer given by Abernethy from that witness stand? I said, What did you expect Mr. Beck to do [1815] when he wrote July 1 in the letter as the deadline? He gave him too much time. Thirty days is enough. What do we care about these people whom we strike down and destroy? Why should we, the great Packard industry, have any thought of sympathy or cooperation for these people who have been with us all of their business life? No. Cut their heads off. Then we will complain if the son tries to stop the flow of blood. There has got to be a stop put to such conduct. There's got to be an honest obedience and observation of the fair laws of trade if the public is going to remain safe and secure. And then when this man has told

what he is supposed to have said down there in Salisbury, he immediately writes, yes, with the aid of his boy, realizing that the whole life's work which he has built up all during this time since this lad wasn't here, since before he was put into the cradle, his father was out selling these machines of Packard's, when he writes him a letter on February 20th of protest, what does he get? What kind of conduct does this fair defendant give? Ignores it. Then when he phones on March 28th, what happens, or 30th? "Keep pumping water." So on March 9th he writes again. What does he get? The same as he got in the letter of February 20th. Ignore it. [1816] They can't even be courteous. Beck, who has known this man over a period of years, and Abernethy, who knew him, these Packard people had known Dick Webster. They couldn't have failed to have known him. Now, they wouldn't even be courteous. Why? They are ashamed of themselves. Just as Porter was ashamed when he went up to DeBaugh and misrepresented as he did what the truth was. He went back to Zell and said, Give this man a little something, be gracious and drop him a crumb from the riches of your table. Then, the same. Dick, we won't give you 30 days to clean you out. We will give you 90. See how kind we are? Ninety days to do what? To give back to Packard what Packard claims is Packard's. When in the examination of Beck he was by his own counsel asked, Did you care anything about the physical assets of Mr. Webster? Did Packard have anything to do with them? Oh, no. Nothing whatsoever. No, they didn't care. And you know, as Beck said, that when he got the word on the 11th, that Packard had accepted the proposition which was laid down in the room in New York, that he immediately on the 4th of March sent the letter to DeBaugh; and on the 13th of February he had been down there trying to

immediately implement to a successful conclusion the [1817] determination which Briggs had made to make the Baltimore area a one dealer town. All of these things are not in dispute. Briggs told you what he did. Beck told you what he did. Abernethy told you what he did. There is no dispute here as to the facts whatsoever. The only purpose now is to avoid the responsibility for what they have done. They attempt to put in a different interpretation on them. They hope to fool Little Red Riding Hood. That's what they were doing. They want some way, if possible, to so redress the events in clothing of new interpretation that you will find:—I don't believe we agreed to do that. We decided to do it. Yes. We didn't decide to do it because Zell asked us to do it. Well, then, why? Because we asked them again on the interrogatories which we put to them, and also in the deposition. Had you ever decided to make Baltimore a one dealer town before April 1, 1952? The answer was no. We asked them whether or not they had ever thought of terminating Webster before April 1, 1952. No. [1818] Well, then what made them do it? Who told them to do it? Who asked them to do it? You know well enough that Zell was completing in that room in the hotel in New York the purpose which he had put on foot when he had written the letter in July to which I just referred to. Also, when in the room in Baltimore in the club he had found out that he had gotten Platfoot to agree to eliminate the franchise of Schulte, and he had gotten them all now to eliminate all of the franchises. So that on the 31st day of March they had completely gotten to the point where there should be no competition whatsoever. Then they ran into trouble for the first time. Not because Mr. Webster knew what you know now, or what any of us know here

who have listened to this case, because we didn't know. We just knew this: That when a man like Webster had been a successful dealer since 1937, was suddenly cut off without explanation, there must be a reason for it. The reason must be an adequate one. We know that as early as March 27th they had re-signed Zell. And when Beck was asked, Did you also intend to renew Zell? He said yes. What did you intend to do with Webster? To terminate him. But then you remember he wrote back and said, [1819] Donald called me on the telephone on March 1st and he didn't talk as his father did. From here on I think we had better conduct this under the advice of counsel. And you learn away back in February Mr. Armstrong was down to the general counsel's office in Detroit. Why? If they had the right to do what they were doing, why did they go in February to the general counsel in Detroit? There wasn't any lawsuit. No one had threatened a lawsuit. If they had the right to do what they had done, why didn't they go ahead? They didn't go down and consult counsel when they wanted to do anything which they had done before. You know why they went down to consult counsel. As Mr. Armstrong said, from that point on nothing was done without the consultation and advice of counsel. They did it because they knew they were violating the law, but they wanted to cover it up in certain ways so that it wouldn't become public, and that Dick Webster wouldn't find it out. Therefore, while they were dealing with Dick Webster, they were going to deal very cautiously, very advisedly, only after consultation, and only after serious deliberation. So we have every move made over the telephone in which Beck is on one end and Armstrong on the other, and [1820] counsel on the third, where it is necessary. They realize now that Webster is not going to take it as he said here. I told Beck on April

3rd at Deal Island, I am not going to take this lying down. I know you have no right to do this to me. It is a sorry day for Packard. It is a sorry day for the public when you are doing what you are trying to do now. So here was the agreement all made. April 1st was the date it was to go into effect. Webster threw a snag in it. You had the deliberations back and forth with Abernethy, Armstrong and Briggs in Detroit. Beck here in Washington. Until finally we get the letter saying on the corner thereof, written by Briggs, Have Beck go down to Deal and try to get a July 1st termination signed up if possible. Nothing on there about a year, until May 31st—or March 31st. Nothing at all. Just that mandate from the top of Packard officialdom to Mr. Beck to get Webster tied up to a 7-1 date. Good advice counsel gave him. Because if they did, they had signed away their lawsuit. Packard would have gotten a very easy out for the destruction of the business. There is a letter which at that time elicited from [1821] Zell, the co-conspirator in this, the thought that he was being double-crossed, and he puts down, you have got to say it in writing hereafter. I think I have a right to have a little something permanent now so I can see, and not depend upon word of mouth. That's the letter which carries on the corner of it, Go down and see if you can get him tied up to 7-1. Then Beck makes a report of that and said, I made it crystal clear to Dick that he had to terminate. That's the time you remember Mr. Webster testified, Is that final? Is that all you can do for me? He said, Yes. But I can buy your parts back. He couldn't buy the parts back in the last agreement. But this time very nice to you. We will buy the parts back from you, or we will give you the credit for what you gave us for the parts. That's 7-1. Now, don't

forget that in between the April 3rd visit something had happened. There was a very large convention of dealers here in the Eastern Division here in Washigton. That was the 16th of April. The 3rd of April they had tried to bamboozle this man Webster into signing away all the rights he had while nobody was there, while they in turn were acting under the advice of counsel, while he, [1822] Dick Webster, was down busy at his place in Deal, with no advice of counsel, with nobody there to discuss the matter over. And even Beck said, I can't tell you now whether I offered him the agreement or whether I told him I had it in my pocket. Frank, full, open, honest. This good friend. Dealing with sympathy for this man who had been with them all of his life. [1823] Then they got the refusal. Beck tells them, no, you can't fool Webster with a 7/1 termination date. The meeting comes on the 16th. Zell had written the letter of March 21st asking that a letter be written to him, and he said, I know your legal counsel will frown on it. Don't you remember it? Of course, the legal counsel would frown on it. When people are doing things that they can't afford to have done or said in the broad light of day, and in the honesty of frankness, they don't write letters. He knew well enough—Zell—that counsel would frown on it. But Zell is over on April 16th, and he sees Briggs on April 16th, and Beck, and they talk over this situation with reference to Webster, and they said, Well, now, go over and offer him a May 31st termination. Now, just get this conduct. And they go over to Baltimore on the 18th, two days after this convention, and they offer the man a blank piece of paper, and they say, Sign it. They haven't signed it. This is the company who is now going to persuade you, if it can, that when it appeared at the office of counsel for

Mr. Webster on the 20th day of May, in good faith offered to renew the contract. And they handed the man a blank piece of paper and [1824] said, Sign it, so they could write what they wished above it, or not sign it, just whichever they wished. And you heard Mr. French tell you, you expect me to sign a blank piece of paper? We always did that. He said, We never have done it. You can imagine anyone in business signing a blank agreement with regard to carrying on an institution such as they had there, selling these automobiles. And don't forget, the dealer had to buy the automobile. He wasn't an agent to sell. It was his money on that showroom floor. It wasn't Packard's. But they handed him that on the 18th and tried to justify it, if you please, by saying, That is the custom. And when I asked Beck, had you at this time signed up this man Zell, he said, I can't remember. Did you ever hear witnesses answer, I can't remember, so much? Did you ever hear witnesses on the stand who demanded that I hand them the documents first before they would answer anything with respect to it? Didn't you see me with Armstrong, I handed him the same document three times in ten minutes, and yet he took time to read it over each time. Why? Well, you know why. You as jurors have seen that [1825] conduct before. He was thinking up what his answer would be while he was re-reading for the third time the same document. So on the 22nd then they go back again and they leave an amendment for the signature of Mr. Webster. Why? Because they found out that now Mr. Webster may be acting with some advice of counsel, just as Packard had been acting under advice of counsel, and knowing the situation in which they found themselves they became desperate to get a renewal, if they could, in order to evade, avoid and

get around the responsibility which had already attached to the conduct of which they were already guilty. They say, Oh, but you bought cars afterward as a dealer. They know right in that agreement there is a clause which says that any dealing after the termination of the agreement shall not be construed against this company as a renewal of the agreement. They knew, too, when Beck said he didn't know—I can't remember—he knew it was on the 28th day of March that he had already signed up Zell. Why? Because this was going into effect on the 1st of April, and that's why they had to have Zell signed up on the 27th of March. And from that day on they say, We didn't agree; this was an independent decision. What kind of an act is it to make against the contemporaneous entry made upon the documents here when they didn't expect you would ever see these? [1826] Take this man Briggs whom you saw here, and he writes on April 29th:

> "As you know we have authorized Marshall Beck to renew the Webster Motor Car Company contract for another year. This particular situation was reviewed in detail."

And when I asked Mr. Armstrong, What is meant by that—your office was next door to his, you conferred daily—what were you talking about, or what was Briggs talking about when he said, He had reveiwed the situation in detail and agreed to—they didn't hesitate to use this word "agreed" until they were before you. Then they don't want you to hear the word "agreed" any more. It is scattered all the way through the correspondence. Verbal agreements, do you remember, being used by the other party, Zell—or by Mr. Sidney Zell or other Baltimore dealers. So that was the situation. And now I just have a few minutes to speak

to you with reference to whether or not it was in good faith that they offered to renew. You know now, I don't have to press the point, whether they were acting in good faith. They haven't acted in good faith from the time they started this illegal and unlawful conduct on their part of eliminating competition against the public interest, of depriving you and me and anybody from going into Baltimore and getting the best trade he could from three or four dealers, from getting the best [1827] possible kind of repair work from three or four dealers; from enjoying what they themselves said, in reply to an interrogatory which we put to Braden, Didn't you encourage competition among your dealers? And the answer was, Of course, we did. Why? Because you can't have competition unless it is beneficial to the public. And in every deal where a manufacturer depends upon the public for the success of his business, standing behind him as the shadow in the sunshine is the great public with whom he deals. It is the third party always in the transaction of these great national companies which depend upon public support in order to give them success in their financial endeavors. They never offered anything in the conference of counsel in Washington toward a renewal of the contract. It shows clearly they never did. Why? Because there was an account written of that at the time, contemporaneously. Nobody made any memorandum whatsoever of that conference except Beck. You heard Abernethy say that when the letter was written on the 6th of May asking that Webster's counsel might be put in touch with counsel for Packard that they came down here for the purpose of getting a renewal. Imagine that. May 20th they are going to get a renewal, yet on April 18th they didn't get a renewal; on April 22nd they hadn't got a renewal; but he said instead of having [1828] our counsel come down here

we considered it a commercial matter. What are they trying to do to you, ladies and gentlemen? What do they think you ladies and gentlemen are? When we remember that they have never made a move without consultation with counsel, and advice of counsel, do they expect you to swallow as bait a statement that they considered it commercial and not legal? The most important piece of business they had, to settle a threatened lawsuit, and it was purely commercial? And isn't it funny, we have here the memorandum signed by Mr. Armstrong before he ever came in to Mr. Leahy's office; he took the file and went through it carefully over in his own office, and we had a receipt which we were able to get. And the only purpose, which the only man who ever made a memorandum of that conference gave as the reason for it was to find out what Webster was going to do. And that is just what they came here for. They came over there. They heard Don Webster review his father's life with Packard; the difficulties which he had as a sub-dealer under Zell. And they left without telling us there ever had been a New York conference; that there ever had been a decision made to make it a one-man town; that they had ever cut DeBaugh's head off in order to implement the program; [1829] that they had never told Dick Webster anything about it. Is that the frankness and fairness that is due if they want to get a contract renewed? We were frank and fair. We told everything we knew, and it isn't until now that we get what they knew, and we had to get it in this difficult, long, weary, tedious, boring, tiring method. Damage? They said, Zell sits in the place where Packard put him, in complete control of the distributive system of Packard in the metropolitan area. Our schedules which we have gone over and submitted to you, we have given you every dollar we made from the time we opened up in 1946 after the war. We have told you just how we made it,

when we made it, where we made it, and the amount we made. Beck himself said that even though this contract lasts only for a year in writing, nevertheless it is continued in the Washington Zone. You know it and I know it—what's the use of me telling you about it? You know automobile dealers who have been in business 25 years. You hear it every day at home on the radio and every place else, because there is a mutuality of interest involved, and it is for the best interest of the manufacturer to keep a good dealer in business; and he remains in business. [1830] And now we know it costs money to change dealers, and we know that Packard is hunting for dealers and in fact have an advertisement which we put in today—didn't have time to draw your attention to it; there it is, in 1954, the Packard franchise more valuable than ever, but it is the franchise that they took and tore up and threw in the face of Mr. Webster in the conduct which they did in agreeing with Zell to cut Webster off, the only man who ever succeeded as a dealer in any number of months, who was always in the black. We showed you that for years over a period he had made approximately $36,000; showed you that after the fire that a ten-year lease had been entered into, and only a year and a half of it had gone; showed you from the lips of Braden, in his deposition, that Braden said that when this thing was finally finished, and when the shop was ready once again to go in full in business that I considered that Webster would continue—and I am using his words—on and on and on. There is every reason to believe, every rational reason to believe, that Webster would have continued down through the years as a dealer with the manufacturer, just as he had since 1937. He had gone through the war always in the black. He had saved that dealership for Packard during [1831] the years of war when there wasn't an automobile manufac-

tured. He had saved it in a fire. He had dug down in his own personal finances to $100,000 to put Packard back—not him. And in 1950 and in 1951 he had bought Packard's old junk—you heard it called the inverted bathtub—he had bought it back from those to whom he had sold it, and who were dissatisfied with it, until as you saw in those years his profits had sunk. Why? Because he was still maintaining the good will of his old customers against the future, because he knew that even if today the profits don't show so much, in 1951, in 1952 now we have got a good model, it is taking hold, and the good will which I have built up through the years and which has always stood by me, will always stand by me now to recoup my losses. We are going to leave it with you. We are going to let you judge what this man has lost. His average was $36,000. You are the ones to make up the determination as to whether he would have continued as he had ever since he attained manhood, a relationship with Packard, and since 1937 a dealer with Packard; and just as from their own lips they said there was no reason that occurred to us even to think of terminating Webster before April 1, 1952, and if [1832] they terminated him, and if they terminated him in this stupid arrangement made with Zell, then upon whom should the sorrow rest? Whom should it worry? Who should stand the loss? Upon him who suffers or upon the one which made him suffer? We leave it with you.

* * *

[1835] (At the bench:)

Mr. Leahy: If Your Honor please, we have the actuarial statements. I don't know what the state of the record is now, or the desire of Your Honor to have them.

The Court: I am going to make this suggestion: If there is objection on the part of the defendant, I will not reopen the matter. If there is no objection I will reopen

the matter for the purpose of putting in those statements. It seems to me that it is for the benefit of defendants to have those statements go in, and that is why I will not reopen the matter if the defendants object.

Mr. Denit: We do not object to reopening. I understood from Your Honor when Your Honor made the prior tentative ruling, that you would permit that up until the time the case was actually submitted to the jury.

The Court: I did say up until the summing up, if I recall correctly, but in view of the fact it is agreeable to both sides before you make your summing up speech I will reopen it.

[1836] Mr. Leahy: I have copies right here, and we might make it a stipulation. All I would do is to say that he made these figures, and here they are.

(The statements were distributed to the Court and counsel.)

The Court: Well, this is the same thing as the summary contained in the brief.

Mr. Leahy: No; no, it has been reduced quite a bit, if Your Honor please.

The Court: The first column has been reduced from $307,000 to $285,000.

Mr. Leahy: Yes.

The Court: In other words, these figures represent $24,000-odd multiplied by seven and three quarters, and then the sum total reduced to present worth.

Mr. Leahy: Yes.

Mr. Smith: Your Honor, we cannot stipulate anything with respect to this summary of losses and damages claimed,

just produced by plaintiff's counsel, and we cannot concede that it is justified, that it is a proper theory, or that it may properly be in evidence or that it may properly be called to the attention of this jury. However, we do not take the position that it is necessary for plaintiff to put a witness on the stand in order to introduce this. If he wishes to offer this, and [1837] explain it, we shall not raise the objection that it is necessary to put the witness on the stand to testify, but we shall reserve all objections.

Mr. Leahy: Oh, surely; oh, yes.

The Court: Yes. Then this summary is admitted in evidence as plaintiffs' next exhibit number.

* * *

Mr. Smith: I would like to state our objection to it unless it is to be assumed that the objections I have just stated are deemed to be made to the offer of the exhibit.

The Court: Yes, indeed.

Mr. Smith: We object, in addition, that it is not justified by any proper theory in this case.

The Court: Very well.

Mr. Leahy: Could I ask, too, is my memory accurate as to a comment Your Honor made with reference to one of the prayers, that it is not a fair subject matter for comment by counsel that this is a treble damage case, that that is a matter for the Court?

The Court: Yes.

Mr. Smith: May I say at the appropriate time I intend to renew our request that Your Honor grant the instruction prayed for in our Prayer No. 33, because we think it is [1838] very vital that this jury understand that it is not the jury's function to treble damages, but the Court's. Your Honor, there is serious risk that the jury

might feel that having decided what it regards as actual damages, it must then treble them.

Mr. Leahy: I think nothing should be mentioned about it.

Mr. Smith: We have a citation on that, if Your Honor please.

The Court: Let me have the case now.

Mr. Barker: The citation that is appended to our Prayer No. 33, Your Honor. It is the usual practice to give such an instruction.

The Court: I have never heard of it.

Mr. Shapiro: It is the case of Cape Cod Food Products versus National Cranberry Association, 119 Federal Supplement 900, at page 911.

Mr. Smith: We do not take the position that the Court made any determination in that case upon that type of instruction, but we believe that that type of instruction was given in that case.

The Court: Oh, well, that is a different proposition.

Mr. Leahy: Directly in point was Judge Bailey's instruction to counsel in the case here in the District of Columbia of Student Law Book Company versus Washington Law Book [1839] Company in which he instructed counsel not to say anything about the fact that it was treble damages. That was an antitrust case.

The Court: What case was that?

Mr. Leahy: Student Law Book Company versus Washington Law Book Company.

The Court: Is that a recent case?

Mr. Leahy: Oh, yes.

The Court: I have a very high regard for Judge Bailey.

Mr. Leahy: And Judge Bastian followed that same rule.

Mr. Smith: We are not taking the position that counsel should mention the fact to the jury. We are taking the position that in order to protect the defendant from prejudice the jury ought to be instructed that it is not the function of the jury to treble the damages, because it is common knowledge that treble damages are awarded in this kind of action, and the jury understands it as well as anybody else.

The Court: I understand your position, and I deny your request. I might say that after I charge the jury, in order to protect the record, you may come to the bench and note an objection to each of my denials. I don't think you have to do it seriatim, but you can just renew the objections.

[1840] Mr. Smith: I understand that our objections to Your Honor's denial of our prayers, as well as our objections which I have given to what Your Honor intends to instruct, are to be made after the giving of Your Honor's charge.

The Court: Certainly, at the bench.

Mr. Smith: And that that is not done before.

The Court: Yes. However, in renewing your objections to the rulings I have already made you don't have to do that seriatim. You can renew them in toto.

Mr. Smith: Yes, but may it be understood that although Rule 51 requires that counsel state his ground for his objection, it will be deemed that the grounds for our objections to the Court's denial of our prayers has been sufficiently stated and no further statement of the grounds need be made?

The Court: Oh, yes.

* * *

ARGUMENT ON BEHALF OF THE DEFENDANTS

Mr. Denit: May it please Your Honor and ladies and gentlemen of the jury: There is one thing concerning which counsel on both sides are in agreement. We are very happy to say to you how much we appreciate your splendid attention and consideration of this case. It is a case which requires attention, and it is a case which requires real [1841] common sense in its determination. When we listened on Friday to the impassioned appeal which was made by our friend on the other side, we had various kinds of emotions. At first it seemed like we were reading the Tale of Two Cities, and Madame Defarge was counting as the guillotine cut off the head, one, two, three. Then we could see the streets flowing with blood, the blood from the head of Mr. Webster, which his son was stopping the flow of. We began to get extremely nervous lest we ourselves might be involved in some such of a dilemma. Then we were reassured that they couldn't fool Little Red Riding Hood. Then we began to get a sense of composure because we realized we were listening to the Big Bad Wolf. Now this case, and particularly this case, ought not to be determined out of an inflamed mind. It ought not to be determined out of the mind that has prejudice injected into it by an impassioned appeal of that sort. It ought to be determined on the merits and in the light of the common sense and judgment which you ladies and gentlemen possess. Nothing more. Nothing less. It is important as we see it that we should approach the consideration of the evidence in this case, having first gotten rid of the weeds that were injected into the garden by [1842] the argument by our friend on the other side. This case has nothing to do with Schulte Motors. This case has nothing to do with DeBaugh Motors. Those men are not before you. They haven't employed these counsel to represent them. They didn't ask that a plea be made in their behalf. They are

not even asserting that they had an injury as a result of anything done or left undone by Packard. Counsel goes far to pick up the crumbs from the rich table of Zell in order that he may in some priestly fashion distribute them to poor Mr. DeBaugh. DeBaugh testified in this case. You saw him. He told you he declined to enter into this lawsuit against Packard or anybody else, even though he was proffered the services of the very counsel who now appear for the Webster Motor Car Company. I will come back to Schulte in just a moment. Let's remember another thing. This lawsuit is being prosecuted solely by Webster Motor Car Company. Mr. Richard Webster is not a present plaintiff before you. It is being prosecuted against Packard Motor Car Company, Marshall Beck, and Clifford Porter. There are no other defendants. Therefore, the insistent, the ambitious, greedy man which Mr. Leahy says is represented by Mr. Zell, and who was the real instigator of any movement to make Baltimore a one dealer city, is not before you. [1843] However you may feel with regard to Mr. Zell with regard to his interests or with regard to those associated with him in his business, that has nothing to do with the justice of a verdict to be reached in this case. We say let's get rid of the weeds. Mr. Leahy continually argued and asserted that as far back as July of 1951 Mr. Zell complained of Schulte and sought to have his franchise revoked or sought to have Packard refuse to grant him a renewal of his franchise. Now, that couldn't have been a slip of the tongue on counsel's part. It was repeated too often. He has asserted it to be a fact. [1844] The evidence in this case is certainly to the contrary. We admit, and it is nothing strange, that dealers complain about the conduct of one another. Dealers complain that they lose deals because of the conduct of a competitor.

Complaint was made by Zell that Schulte was guilty of bad advertising practices and bad dealing with the public. Mr. Webster didn't tell you that he complained about Schulte. Mr. Webster wrote this letter on March 14, 1950 to Mr. Braden, the zone manager:

> "I know you will understand the spirit in which this letter is written. It is written in the hope that what I say will contribute to the welfare of the Packard dealers, the factory, and Packard owners. I very deeply feel that unless something is done about the following matter, grave consequences to all three are bound to follow. I am inbued with a Packard pride and spirit born of nearly a lifetime in Packard's service. I have always been proud to represent Packard and to be a part of its old and honorable family. Lately, the Baltimore public must have received from Baltimore dealer-advertising a type of impression which I feel is most detrimental to these dealers, as well as to the factory. I am enclosing an advertisement that appeared on the back page of the March 1st Morning Sun. I am [1845] convinced, Sam, that such advertising, no matter which dealer is guilty of it, does not create one additional Packard sale in this territory. I am equally convinced that by its overtones or its flavor, or by creating the impression it does, call it what you will, it makes the man who has finally firmly decided to buy a Packard leave the dealer who has patiently persuaded him that Packard is the only car. Is this leave-taking permanent? Maybe yes, maybe no; because the man-about-to-become-a-Packard-owner then goes from Packard dealer to Packard dealer, getting each one to compete against

the other. The result; the buyer gets the car of his dreams; the dealer who has 'one' sale by overallowing, i.e. in effect gets red ink; the salesman who worked perhaps months to prove to the buyer that Packard was best, gets a 'Sorry, but X allowed me $100 more. You know how it is.' Thus, the Packard factory gains nothing but dog-eat-dog dealers in an under-the-table sales reputation. I realize that the factory wishes healthy competition, when such competition is directed against Buick, Chrysler, Cadillac, and others; but, I am equally confident that the factory does not wish every prospective Packard purchaser to go from one Packard dealer to the other until he has purchased a Packard at cost or less. [1846] Such a policy is a guarantee that all Packard dealers must close up."

Then skipping a paragraph.

"Packard dealers are anxious to do their utmost to obtain their share of the market. I feel that Young & Rubicam have worked up some small advertisements for dealers which are advantageous to Packard and which should bring profit to the dealer so advertising. Surely we all wish to get back on the profit side. I feel that if the factory stresses some of our old principles such as 'One price to everyone,' 'You don't have to be a horse-trader to buy a Packard,' in their guidance to their dealers, much good will result. The only way a Packard dealer can profit is to create a desire for Packard ownership, and then to receive those deals which because of his efforts he rightly deserves. In conclusion, I respectfully protest that advertisements such

as the one in the March 1st Morning Sun offset and nullify the spirit and initiative that aggressive salesmen and Packard dealers should have. We have no objections to this dealer, as such. Rather, we feel that his advertising policies are destructive and detrimental to the other Baltimore Packard dealers and salesmen. If that feeling is justified, the factory, too, is a loser."

[1847] Now, this is a man, Mr. Webster's counsel cries about having been disenfranchised, and Mr. Webster is writing about him on March 4, 1950. [1848] And having seen and heard Mr. Webster on the witness stand, I am quite sure you all recognize the authorship of this letter. And in the letter there was enclosed an advertisement complained of:

"Pick Packard. Pick Schulte. (Means a good deal) The highest trader this side of the Mason-Dixon line. 6400 Frederick Road."

Mr. Webster didn't stop complaining about Schulte on March 4, 1950. Contact report made about him on April 19, 1951 discloses, continuing to complain about Schulte and deals he is taking:

"If Schulte got all dealers Webster and Zell complained he stole, Schulte would be the largest dealer in business."

Now what did Schulte do? Mr. Leahy argued, put questions in the mouths of witnesses calculated to show that Schulte resigned or, rather, was terminated on January 14, 1952. Here is a letter that Mr. Schulte wrote to Packard Motor Car Company, dated December 14, 1951:

"In reference to our conversation, the early part of this week, regarding cancellation of our Packard franchise at both 3605 Wilkens Avenue and 4615 Edmondson [1849] Avenue, or if your records should show 6400 Frederick Road. We would like to have this become final as of the customary 30 day period from the above-mentioned date of this letter. I beg yours and the factory's cooperation and mercy in the complete return of my parts, plus any tools, signs, and etcetera that I may have pertaining to your franchise. Since my association with you personally and your fellow workers, I must say that it has been a pleasure. I only hope that someday, I may return once again into the realm of your fine organization."

Do you think that if a man had his franchise terminated, do you think that if a man had any feeling toward the organization engendered by reason of its participation in some sort of conspiracy or contract with Zell, he would have written that kind of a letter? Doesn't that indicate that the termination of Schulte's relationship with Packard was on the terms which Schulte desired and they were satisfactory to him? Indeed, doesn't it even prove more? Doesn't it prove that he entertains a desire in the future to again become associated with that splendid organization? Then to make proof doubly certain, there is in [1850] evidence here an agreement for a mutual cancellation of Packard Dealer's Sales Agreement, and it is dated December 14, 1951. So when we talk about Schulte being affected by the agreement with Zell, running back to July of 1951, we are just using a whole lot of window dressing. It simply isn't true, and it wasn't, and there couldn't have been any agreement between Zeil and Packard as of July,

1952, to eliminate anybody. As a matter of fact, counsel had in his possession at the time of making the argument the transcript of the testimony taken before this trial, and that showed crystal clear that there had never been any agreement between Zell and Packard that Schulte would be eliminated, or that his franchise would not be renewed, or that his place would not be refilled after he voluntarily surrendered his franchise. [1851] As a matter of fact don't you recall contact reports being read to you that Mr. Porter spent time in Schulte's place of business trying to arrange somebody to take over the Schulte business, because it was a dealership in a location which Packard regarded as valuable and well worth while preserving? Now we go to the next step. A great deal has been made about this whispering conspiracy to eliminate DeBaugh and because DeBaugh was a small dealer there were a lot of tears shed on account of his demise. Now, ladies and gentlemen of the jury, don't be persuaded by that kind of evidence or that kind of an argument, because it doesn't represent the real truth. The fact is that Mr. DeBaugh was the smallest dealer in Packard automobiles in the whole Baltimore area. He sold 12 cars in 1950, and he sold 10 cars in 1951. And there were approximately 500 cars sold during 1950 and a similar number during 1951 by all the other dealers combined. So you see the elimination of DeBaugh, who was selling on an average of one car a month, could not possibly add to the value of Zell's franchise or add to the opportunities that he had to make deeper penetration into the market, that is, get larger volume. And Mr. DeBaugh left as a Packard dealer with the statement from Mr. Beck, which has never been denied, that if [1852] in the future, after the trial period they were going to give the Zell organization expired, it would be possible to regrant his dealer's contract it would be done. Now, all of you remem-

ber that, don't you? Does that indicate that Zell had any purpose for keeping DeBaugh out of business? Does that indicate that Packard had any purpose for keeping DeBaugh out of business? Or to keep him from competition with Zell? Then mention was made of the fact that arrangements were made whereby DeBaugh could go to Zell's organization and get an automobile delivered to him ready to hand over to his customer at approximately 5 per cent on the list price. You heard the evidence and you heard how the arrangement was made. It was an arrangement just as advantageous to Mr. DeBaugh as if he were buying from the factory, because all of the things that were necessary to be done to put the car in condition for delivery to the customer, all of the financing, all of the banking arrangements were done by Zell, and DeBaugh had merely to deliver the automobile. On that, according to the evidence in this case, you saw he had an opportunity to make a profit of approximately $500 a car. Does that look like somebody who is out gunning for the scalp of DeBaugh? [1853] Does that look like somebody is out to chop off his head? He still had the means by which he could obtain the automobiles to take care of his limited number of customers, and he could do it by merely parting with a small portion of his gross profit. So much for what is not in this case. Let's get down to brass tacks as to what the case really amounts to. You have been given a picture which though on the face of it seems to be complicated is a very real and interesting one. Automobile manufacturers produce a commodity. It is not unlike many other commodities—your shoes, your clothes, your radios, your televisions, all produced in factories. Some of the commodities which we human beings buy we purchase at a department store or a corner store. We buy products that are made by factories large in size, vast in their

ramifications. The department store is in between us and the producer. In marketing automobiles a different system is used. The factory sells to the dealer. The dealer is the factory's customer. The factory therefore has an interest in the dealer, an interest selfish to be sure, but also an interest the ultimate benefit of which comes to you and to me [1854] as members of the public, because the better automobiles are produced, and the cheaper automobiles are produced, the more automobiles are available to all of us to use in our lives. Now, selection of dealers is therefore synonymous with selection of customers. You select the customer who will do the best by you. Therefore you select the dealer who is calculated to project your product into that competitive position which you think it is entitled to have. That is called price class, as you have heard it described in this case. Packard is in the price class of Chrysler, Cadillac, Buick, Nash, Oldsmobile. Packard dealers therefore are selected who will give to Packard the competition against the sale of those other automobiles that are comparable in size, value, and price. In January of 1952 the Packard sales organization was confronted with a problem. One of its dealers, the Zell Motor Company, requested an audience with the general sales manager in order that he might discuss his problem with him. Now, there isn't anything unusual about that. As a matter of fact, you heard from the testimony of the witnesses, and you probably know as a matter of common knowledge, that the factory encourages its dealers to discuss problems with it. The factory encourages frequent contact with its dealers. The factory wants the dealer to know what is going on in the [1855] factory, and what they have a right to expect they can project to the public, and the sales arguments they can develop in order to meet the sales arguments of other makes and manufacturers. There wasn't

anything clandestine about this conference in New York. It was what I would term a visit. These men, all automobile manufacturers, were attending a show and convention where other automobile manufacturers and dealers were attending. You know that a general sales manager with 1,800 points of contact, as indicated in this case, can be a very busy man. And those of you who have attended conventions know that the hours of the day which you can devote to legitimate business are sometimes very restricted because of the social functions that must be attended. So in order that there might be a convenient time, convenient to both the factory representatives and to Mr. Zell, a specific hour was fixed. Mr. Zell with Mr. Briggs, Mr. Abernethy, Mr. Beck and Mr. Fenn sat down in their hotel room to discuss Mr. Zell's problem. It was a problem in which the factory rightly should have an interest. It was a problem that affected the factory almost as much as it did Mr. Zell, because the Sidney Zell organization was the tenth largest Packard dealer in the [1856] United States, and the Zell organization had been a Packard dealer for generations. Mr. Zell outlined his situation, part of which was undoubtedly familiar to the factory representatives. They listened. Did they give him a snap judgment answer? No. They said, this will require some consideration. We will have to explore the matter, determine its ramifications, and we will advise you of our decision as soon as it conveniently can be done. Now, was that all poppycock? You heard from the mouth of Mr. Briggs, and from the mouth of Mr. Abernethy just what was done. Can you pooh-pooh it and say it didn't occur? Can you make fun of it and say you ought not to believe it? Can you characterize as stupid either of those men, or what they said and did, and therefore completely eradicate it from the case? We think not. They went about their respective businesses.

The factory men returned to Detroit, Mr. Zell to Baltimore, Mr. Beck to Washington. And in approximately two weeks Mr. Zell, becoming restless that he had heard nothing with respect to whether they would comply with his request and make him a sole dealer, or make Baltimore a sole-dealer town as it was put, called Mr. Beck. It was perfectly natural that he should do so because Beck was the zone manager and the man with whom he should have his immediate contact. And Mr. Beck called Detroit. [1857] And then the answer came, Mr. Briggs has decided to make Baltimore a one-dealer town; you will proceed to do what is necessary to accomplish that. I don't want to labor the point about what these gentlemen thought, said, or did. And in order that you may have crystallized before you I will indicate again the factors they took into consideration in determining what to do upon Mr. Zell's request. One of the witnesses, Mr. Armstrong, said it was a matter of Hobson's choice. That meant you either take Zell or else. Hobson's choice is an old expression; originated, we understand, some 400 years ago. An old man by the name of Hobson ran a livery stable, and if you came in to hire a horse you would take the horse nearest to the stable door, or else you had no horse at all. Zell had indicated he was going to retire from the Packard business in Baltimore. That would leave Baltimore with one dealer, namely, Webster. Was Webster strong enough, large enough, aggressive enough, capable of servicing Packard's business and Packard's customers in the Baltimore area? Well, these men said, Webster doesn't have the facilities that Zell has. Here is a photograph showing the Zell plant. Do you remember that in comparison to the photograph showing the Webster plant? [1858] Here is another photograph showing the department where they are getting ready to condition cars to deliver them. Here is another

photograph showing the servicing of cars in the plant. Here is another photograph showing a showroom with many cars in it. Did you see anything comparable to that in the photographs of the Webster plant? Here is still another photograph showing the appointments of a showroom for new cars in the Zell plant. Was there anything like that among the pictures you saw of Webster's plant? Here are cars being prepared for delivery. You can see the substantial quality of the construction, the size of the building. Did Webster have anything like that? Here is another photograph showing the area in which the customers of Zell could receive service. Did Webster have anything like that? Here is an auxiliary building of Zell; did Webster have anything like that? Here is another parking area of Zell. Did Webster have anything like that? Why, ladies and gentlemen of the jury, the sales agreements that these organizations entered into with Packard show the following, and I am reading now from Defendants' [1859] Exhibit No. 37, the contract between Zell and Packard:

> "Area of building, 70,000 square feet. From the contract to Webster: Area of building, 9,200 square feet. Contract of Zell: Area of showroom, 2,000 square feet. Contract of Webster: 630 square feet. Area of parts and accessory department of Zell: 1,500 square feet. Same area, Webster: 312 square feet. Area of service department, Zell: 64,500 square feet. Webster: 8,258 square feet. Area of customers' parking lot, 3,000 square feet, in the Zell contract. Webster: 1,500 square feet. Area of used car department, Zell: 2,000 square feet and/or inside storage. Webster: 3,500 square feet. Character of building: Zell buildings con-

structed of reinforced steel and concrete with brick facing, clean and well lighted." Webster: Steel frame and stone construction, plate glass front, roof composition, steel supports."

Now, the first consideration that these men at the [1860] factory gave was to the comparative facilities of the two organizations. If you were required to make a selection based upon a comparison of these facilities, which would you choose? Where would you want your customers to transact their business? In the Zell building? Or in the Webster building? That was one of the things the company officials had to decide.

The Court: This might be a convenient time to take our mid-morning recess. I think you have come to the end of that specific subject.

Mr. Denit: Yes, sir.

[1861] (Following brief recess:)

Mr. Denit: Now another factor which the company officials took into consideration was the comparative working capital of these two organizations. According to the financial statements which they filed with the company pursuant to their dealer sales contract, this picture was presented: As of January, 1951, Zell had working capital of $212,597 as compared to $46,235 for Webster. The working capital varied, according to the exhibit which was offered in evidence here. Zell's highest figure was $231,000 and Webster's highest figure during the year was $60,000. The average working capital for the entire year which the Zell organization had was $216,540 as compared to the average working capital of the Webster organization of $49,584. So you can see Zell had approximately five times more net working capital in the business than Webster had.

And as of 1951, you all know the assets of the Webster Motor Car Company were being siphoned into the Somerset Seafood Company. So that the Webster organization indicated weakness in working capital as compared to the strength of the Zell organization. Now if you have a dealer who has adequate facilities to service your business, if you have a dealer who has adequate [1862] capital to insure his ability to continue your business, are you going to reject him, and take one who shows, No. 1, an increasing interest in a wholly different business, 2, the application of his capital to that other business, and 3, lesser facilities to service the business by way of housing and general equipment. Another factor which was taken into consideration was the aggressive attitude of the Zell organization, its willingness to compete with other makes of cars rather than to limit its activities to re-trading with Packard owners. Now, from whom do you get the most business? The dealer who goes out and competes with Cadillac and Buick and Chrysler and Oldsmobile, or do you get the most business from a dealer who confines his activities to trading with original Packard owners? You want to increase your market. You can't stand still and grow. That's demonstrated by everything around you. When a plant begins to fall down, it dies. When a business organization refuses to meet competition, and to adopt new ideas, or to rearrange its thinking, it is stifled and dies. As a matter of fact, if you hold your arm out there continuously in one place for any considerable length of time, what happens? Your muscles become stiff, don't they. And if you continue that arm in that position for a sufficiently long period of time, you lose the use of it. [1863] Webster's organization was beginning to show that kind of atrophy in competing with other makes of cars. Those things were taken into consideration. Zell had an organization where you could

see Zell when you wanted to transact business with him. Webster had an organization where you could see him only during the months that didn't have an R in them. He was at the seafood place until April. He continued there from September until April, visiting Baltimore on a Saturday evening or a Sunday. What business can you transact with an automobile dealer of any appreciable size on a Saturday afternoon or a Sunday, particularly if you recognize what every man with his eyes open is bound to see, the competition of other makes were gradually trying to grab your share of the business for themselves. What kind of a decision, ladies and gentlemen of the jury, would you expect officials of this company to make? They weren't sitting there as Old Man Packard. They were executives in an organization whose business and property were owned by stockholders, thousands of them over the country, maybe some of your friends, and certainly many, many of them women. They had to go out and sustain the business of this company by making a selection based upon merit, wholly divorced from the consideration that Webster was a smaller dealer than Zell. [1864] That didn't enter into their minds. They weren't out to eliminate Webster merely for the purpose of eliminating Webster. You heard the common sense that flowed from the lips of these three men, dealers were hard to get, especially for Packard in those years. We didn't want to eliminate any dealer. But we had Hobson's choice in Baltimore. It was either take what we could get, or lose the Baltimore area so far as we were concerned, unless we were willing to set up a factory department there. And you know perfectly well that that kind of an arrangement is never satisfactory as to operate through a dealer who is localized, where the people can see him day in and day out, who would know and understand his methods of

doing business. What kind of a decision would businessmen make? They couldn't help but decide that Baltimore, in order to be preserved to them as a territory where they would have any penetration in their price class would have to be a one dealer town, and that Zell would have to be the one dealer. Now, you don't find in that any purpose to restrain trade. Indeed, you find just the contrary. It is to insure that trade will be constant, and that Packards will continue to flow into that territory for people who desire to purchase them, constantly, and without interruption. That was the thing that could not have been [1865] accomplished if Webster were selected as the sole dealer. Wouldn't it have been queer if Packard had selected Webster to be the sole dealer? Would we be here now defending a suit by Zell on the theory that we had eliminated Zell and made Webster the dealer? Peculiar kind of thing, isn't it? Here's a manufacturer not reaching out for an opportunity to make a one dealer town, but confronted with the necessity of choosing as between two dealers which one it preferred to do business with, not simply from the standpoint of its own purchases, not simply from the standpoint of the dollars and cents it meant to the Packard organization. Of course, that was an incident too. But from the standpoint of how the Packard Motor Car Company could continue to service people who owned Packard cars and who wanted service in accordance with Packard's standards, from recognized Packard dealers. So they made the choice. And the choice, of course, fell where it should fall, in view of this kind of an analysis, the choice fell to Zell. Mr. Beck was then asked to implement or carry out the plan which would mean not renewing the DeBaugh contract, and not renewing the Webster contract. Mr. Beck has been made considerably the goat in this case. Counsel

has delighted in Shakespearian style of whispering to you his answers that came to him just as clear [1866] and audibly as I am talking to you now. He said, "I don't know." For three days you heard the Beck deposition read, and what did we find out? No. 1, that he received a call from Mr. Abernethy and he set out to carry into execution what was required of him as zone manager. Instead of discrediting Beck in making him appear to be a man unworthy of belief, it seems to us the record in this case demonstrates he is an altogether different individual. He had known Mr. Richard Webster as long as he had been zone manager. You saw how they addressed each other. "Dear Dick." [1867] He went down to talk to Mr. Webster about the termination of his agreement. He could have taken with him, as you ladies and gentlemen well know, a memorandum effective March 31, 1952. Your contract will expire and will not be renewed. He had a perfect right to do that. He couldn't have been criticized if he did it, using the same tactics of criticizing him that the other side applied. Now, he knew this man. He went down and sat down to lunch with him, not to give him a peremptory notice as a landlord would give a tenant who is in default for payment of rent for a long period of time. No, he sat down and talked to him about the problem. Of course, it presented a problem to both Mr. Beck and to Mr. Webster. He said, to his eternal praise, he undertook to do it as a gentleman. They conferred there over the luncheon table. Mr. Beck indicated that in view of the fact—he used more tender words probably than were required—but in any event he got across to Mr. Webster the idea that his franchise should not be renewed. And in order that this might not be inconvenient to Mr. Webster or his organization, he undertook to point out a date when matters after the ter-

mination of the franchise should be completed. There is an express provision in the contract. It [1868] is limited to 30 days. Mr. Beck said July 1st. He pulled that date out of the air because it would give him 90 days instead of 30 days to clean up the dealership. He is being criticized for that, saying that he did that surreptitiously, put something over on that grand old man. Now, there isn't a great deal of difference, you know, between horse traders and automobile dealers. You don't put something over on an experienced automobile dealer with his eyes wide open. Mr. Webster didn't indicate to you on the witness stand, I am sure, by his answers to the questions that were put to him, that he was a man likely to be confused or a man likely to be abused. Beck did the same thing. He wrote him a note when he got back on the very day after he talked to him. He said, This will confirm our understanding of yesterday.

> "It was the consensus of opinion that because of the existing circumstances in your Packard dealership in Baltimore, Maryland, that your best interests could be served by the liquidation of this dealership, thereby terminating your Packard franchise. We want you to know, Dick, that Mr. Porter and myself will do everything possible in assisting you to carry out this program."

Do you believe for a minute that Beck would have had the colossal gall and nerve to sit down on the 14th of [1869] February and write that letter concerning the conversation that took place on the 13th of February unless Beck was telling the absolute truth? What reason would he have to falsify? He was doing nothing wrong. He wasn't hiding anything. My friend says that conspirators don't write letters. Well, if that be true, then we are not guilty in this

case, and there ought to be a quick verdict at your hands, because we wrote too many.

Mr. Beck said:

> "It was mutually agreed that you will begin now to effect such termination so that it will be completed at the earliest possible time. In order that we will be able to chart our future in Baltimore, we would like to set July 1, 1952, as the deadline on the latest date for the termination of your Packard dealer's sales agreement. With very kindest personal regards, I am, Very truly yours, M. G. Beck, Zone Manager."

Do you think any man would have had the nerve to falsify what he says in that letter and couch it in the terms "With very kindest personal regards, I am."—— Now, Mr. Webster said after he received that letter he was shocked. He conferred with his son about it. Mr. Webster to this day has not told you what he said to Beck when Beck visited him in Salisbury. He said a lot about what Beck said [1870] to him, but he hasn't said one word as to what he communicated to Beck with regard to his desire and purpose in connection with the Webster Motor Car Company. Search your memory and you will come to the conclusion that Mr. Webster didn't tell you all that transpired, and that Marshall Beck correctly stated what had really occurred. Now, why do I say that? You know the old warrior named Al Smith used to say that the truth will come out even in affidavits. On the 20th of February, 1952, within a week of the Beck letter, Mr. Webster writes:

> "Your suggestion that at our Salisbury meeting, it was the concensus of opinion that 'because of the existing circumstances' in the Webster Motor

> Car Company, my interests could best be served by liquidation—I am at a loss to know what the 'existing circumstances' are which you mention."

He doesn't say, You didn't tell me that, but, I am at a loss to know what the "existing circumstances" are which you mention.

> "Since I am confident that it can be shown that, in relation to Zell's capital investment, we have always done a better job, are there 'existing circumstances' in the Zell organization necessitating any such action as [1871] you suggest to be in my best interests?"

Now, if you were writing a letter to a man who told you that this is what you said and what you agreed upon, would you go into an argument about that or would you say, Mr. Beck, you have deliberately and completely falsified the conference we had? Would you call him "Dear Marshall," if you thought he was a liar and a crook, and would you wind up by saying, "With very kindest personal regards?" What would you think if you received a letter from an organization with which you were connected saying that it was agreed in our conference that you were going to retire, and it wasn't so? Would you write to the man who says you agreed yesterday, and you call him "Dear Marshall"? Wouldn't I think of a stronger word to use to characterize conduct which nobody believes? Now Mr. Webster was in the seafood business, and this language really becomes fishy.

> "As to whether or not I would be willing to liquidate or to sell my interest in the Webster Motor Car Company, I can only say that, depending on price, such an occurrence is not beyond the realm of possibility."

[1872] Beck didn't say anything in this letter about selling the Webster Motor Car Company, did he? Why is Richard countering with this kind of language? Liquidation of the business was in his mind. Liquidation of the business was discussed, just as Beck said. (Reading)

> "Naturally, because of its effect upon prospective buyers, I would not"—and this is capitalized—"Under Any Circumstances attempt to complete such a liquidation or sale by any pre-arranged date."

He is not opposed to attempting it but he doesn't want to do it by any pre-arranged date. (Reading)

> "What price I would require is too important a decision for me to make without the advice of my auditors, lawyers, and tax advisers. However, it is my feeling that the purchaser would have to agree to lease the York Road property for at least 10 years at no less than $750 per month, apart from paying dollar for dollar for inventory, fixtures, machinery, etcetera. My first impression is that since I could assist the purchaser in Packard sales policy, a yearly salary of at least $15,000 for no less than 10 years would be the type of agreement I should make."

Here is a man continuing the conversation with Beck and at the same time telling Beck that what he said [1873] occurred didn't actually occur. (Reading)

> "For a multitude of reasons (the explanation of which lies a lifetime of Packard service) I do not intend to think in a negative fashion about the matters which you discussed in your letter. Rather than think in terms of liquidation or sale, it is my

intention to plan and work for the improvement and advancement of the Webster Motor Car Company as a franchised Packard dealer. With the assistance and advice of you and Mr. Porter, I feel sure that the $15,000 to $30,000 which I have earned yearly can be greatly increased while doing an even better job."

Now, ladies and gentlemen of the jury, if you received a letter from a man which you said contained a lie, would you write him a letter in reply and say "With your assistance and advice of you and Mr. Porter, I feel sure" that I can do thus and so. Wouldn't he immediately be cut off from your realm of friends if he attributed to you something that you didn't actually say? This letter, we submit, is inferentially a direct confirmation of the assertion made by Mr. Beck that Webster agreed to a termination of his dealership. Now, you know that this letter was a joint product of father and son. It sounds something like Richard in parts; [1874] it looks more like Donald in other parts. And Donald was composing a letter concerning a conversation with respect to an anticipated plan that he never knew except as it was submitted to him by his father, and then he said, in substance, Dad, you are a worry-wart; you are confused. Yet, busy little Donald begins on March 1, 1952, to retrace the Salisbury meeting between Beck and Richard and Porter, and he calls Mr. Beck at his home, and then he proceeds to make a memorandum of what Beck said, and so he didn't say what he, Donald, thought—the first memorandum made by the Webster family or any of its connections in connection with the Packard dealer relationship. And listen to this again:

"This morning at approximately 10:30 a. m. I called Mr. Marshall Beck at his home for the pur-

> pose of arranging an interview concerning his proposal that the Webster Motor Car Company be liquidated and Dad's position in that matter. Beck was suffering with a bad cold and suggested we discuss the matter then and there over the phone. He told me that when he received Dad's letter in response to his of February 14th, 1952, he was surprised that Dad was unwilling to proceed with prompt liquidation."

Now, why would he be surprised if in fact it had [1875] not been agreed upon? Why would he be surprised to find Webster reneging on his acquiescence in the termination of his dealership unless it was arranged that that should take place on February 13, 1950? And you are getting Donald Webster's report of this interview, not Beck's. (Reading:)

> "He reported that he forwarded the letter (Dad's) on to the Packard factory and that they sent the Eastern district divisional sales manager on to Washington. He reported that he and that official (I am not 100 per cent sure of that title) went to Baltimore yesterday for the purpose of discussing that problem of Webster Motor Car Company liquidation with Sidney Zell."

Now, you know all that's true, don't you? The evidence in this case shows that Beck's letter and Webster's letter were forwarded to the factory. The evidence does show that the Eastern division sales manager came to Washington and went with Beck to Baltimore to see Mr. Zell. All that's true. (Reading:)

> "They had lunch together, whether more than the three were present was not made plain. Beck

> assured me that Sidney Zell would be extremely fair in any liquidation proposition which Dad wished to discuss with him. Beck also tried to assure me that Zell did not know that the factory intended not to renew our franchise, but I am sure Zell knew. [1876] Beck said that he felt Dad did not need the money and that it would be in Dad's best interest to liquidate and he stressed that Dad had not been able to devote full time to the Packard business."

Aren't they matters which disclosed they were discussed in the Beck conference at Salisbury? And Beck is repeating them word for word to Donald Webster. Said Donald Webster:

> "I asked him pointedly what the factory's plan or policy was concerning metropolitan dealerships and in particular as to Baltimore. He answered that it was the factory's current policy for Baltimore to think in terms of one metropolitan dealership."

All along it has been claimed that Webster knew nothing about the plan to make Baltimore a one dealership town, and here is Beck telling Donald and here is Donald recording it on March 1, 1952, a month before the Webster contract would terminate by its terms. (Reading:)

> "I told him that then the problem was merely whether it would be Zell or Webster."

That's exactly what the company officials thought in Detroit. That was the decision that they were required to make, and Donald Webster saw that immediately it was either Webster or Zell. (Reading:)

"He responded that there was no problem since the [1877] factory intended not to renew Webster's franchise."

Donald knew on March 1st that that was the intention.

"I asked him if that meant that Webster would not get a renewal agreement at the end of March, 1952. He said that he assumed it did and assured me that he was just carrying out orders from Detroit."

Listen to this statement of Webster's attitude again:

"I told him that Dad would not want to impede the policy of the factory to establish one dealership in Baltimore."

Now if Richard said that, as reported, he knew it wasn't so.

"* * * but that it would be essential that Dad be given an opportunity to sell his business."

They were perfectly willing that Baltimore should be a one dealer town so long as Webster got what he desired. And it is for you to say whether on the evidence that has been produced before you Webster had any justification for believing and expecting that he would be employed on a 10-year basis at a $15,000 salary by the purchaser of his business, assuming that he devoted no more time to the motor car business than he had been doing prior to 1952.

"He responded that Dad would have nothing but tangible assets to sell. I said, What about the good [1878] will? He responded that in liquidation good will would be worth nothing. I reminded him that Dad did not intend to liquidate but rather to sell

out as a going business at a reasonable price, while leasing the real estate at fair rental."

Now Webster was willing to sell out and lease the real estate at a fair rental on March 1, 1952.

> "He became a little riled and reminded me that the franchise agreement was to be terminated at the end of March. I then reminded him that if Dad had known that the factory was going to change from a highly competitive dealer policy (Zell, Scott, Schulte and Webster) to one metropolitan dealership policy (Zell) he would never have taken their advice (namely, the advice of Beck and Braden) to buy the property, to rebuild it, to purchase the new machinery, stock and fixtures that he did after the fire in the fall of 1949. Beck said that they had not encouraged Dad to invest as Dad claims. I said that was a disputed matter of fact."

Doesn't the tenor of this letter, the guarded way in which Donald Webster replied to Beck, the shifting of position back and forth, indicate in another very clear fashion that Beck did discuss with Webster and get an agreement that his dealership would terminate as of July 1, 1952? Now, when these gentlemen, father and son, indicated [1879] that there was a sharp disagreement between their version and Beck's version, Beck sent the papers to Detroit, and here comes the line of events out of which counsel has made so much: Mr. Armstrong, who first saw the correspondence, was of the opinion that Beck had overstepped his mark. That instead of giving a notice of termination in the regular way, what he had done amounted to offering Webster a renewal contract to July 1, 1952. That that was an irregular, abnormal contract, different

from any that the company had, all of which terminated March 31, 1952; so he conferred with counsel. Counsel confirmed that opinion. Then Mr. Beck was instructed to offer to Mr. Webster a July 1, 1952 contract, having debated with Mr. Armstrong and Mr. Abernethy that there was no necessity for offering a March 31, 1953 contract, because he was sure Webster would accept the July 1st agreement. Based upon his representation to them, he was authorized to offer the July 1, 1952 termination date. That was offered. It was rejected by the Websters. Then Mr. Beck was authorized to offer a contract of renewal to March 31, 1953, and that was offered. It is in evidence as Plaintiffs' Exhibit No. 22. And as you can see it is on a printed form; blank spaces being filled in by matter in typewriting on the last page and on the page [1880] referring to quota. This agreement was submitted to the Webster organization on April 23, 1952. They held it and made no reply.

The Court: Mr. Denit, for acoustical reasons I am going to ask you to step further back. I indicated that at the bench to both counsel.

Mr. Denit: Yes, sir. I merely wanted to show the agreement to the jury so that they would understand what it was.

The Court: I understand.

Mr. Denit: Now, the Websters became very active in seeking a basis upon which they could not renew their contract but seeking a basis upon which they might obtain damages against the Packard Motor Company and Zell and others for alleged violation of the antitrust law. Now, ladies and gentlemen, stupidity is a pardonable thing. Sometimes it is impossible to avoid characterization of ruthlessness because words can be piled upon one another until they give a picture of a giant colossus in forcing his judgment upon a small weakling. Mr. Webster, of course,

is not a poor man. You have seen the records here as to the assets which he either owns directly or indirectly. You have seen a record of the earnings. You have seen a record of what Mr. Webster personally has taken out of those assets each year since 1946. [1881] But a worse thing to be said than "ruthlessness" or "stupidity" is "hypocrite." This record portrays the true picture of a hypocrite operating daily from the middle of March until the end of June. Mr. Webster wrote lies in which he professed his love for the Packard organization. His counsel has said that he breathed the atmosphere and was the personification of everything that was Packard. He claimed that he saw a great, bright future for Packard after 1952, and that he was enthusiastic and zealous to continue as a Packard dealer until his life's end. [1882] What do you find him doing? He has a contract in his possession in April which would enable him to continue as a Packard dealer until March 31, 1953. Does he sign it? No. What does he do? He goes to the Packard dealer in Baltimore and he lends that dealer the money to buy an automobile from Zell so that he, Webster will have a link in the chain of evidence which he intends to use in an anti-trust suit. Isn't that hypocrisy? He stands by and lets his son read to this other dealer the provisions of the antitrust laws, and he and his son, together, undertake to have this dealer join with them, employ the counsel that they have employed, in order to prosecute the Packard Motor Car Company and the Zell organization. Now, can you believe Mr. Webster was acting in good faith? You heard the extent to which his son went in his presence in undertaking to procure the assistance of DeBaugh in the prosecution of the lawsuit. He told DeBaugh that these people will attempt to suborn you to commit perjury. And you sat in this court room

this morning and heard the Court describe the magnitude of the offense of perjury. He couldn't have believed it. He was using that strategy to coerce the boy to join him. He said to DeBaugh, They will probably come to you and get you to sign a contract with a date in it so that you will be reinstated. There [1883] isn't anything they wouldn't stoop to in order to accomplish the enslavement of other Packard dealers. Donald Webster knew down deep in his heart that that was a pure unmitigated lie. And when his father stood beside him with all of his love for Packard, seeking to find some means by which he would get not a profit from Packard, but damages by way of punishment, he was seeking to draw the kind of blood that you heard described in counsel's opening statement on Friday. These people didn't stop there. They employed the strategy of sending young Donald to Mr. Zell. Zell is the man that they were down in their hearts satisfied was a conspirator who started out a plan or a scheme to destroy them. He went down to Mr. Zell to see if Mr. Zell would be interested in joining with them in getting a Cadillac franchise. Well, there is an old saying in politics, if you can't lick them, join them. But does it stand to reason now that they were honest when they went to Zell and made those overtures, or wasn't he acting as spy in civilian clothes, deceiving the man just as he would deceive you? Oh, what a tangled web when we practice to deceive. Donald Webster was compelled to admit that he had no purpose in trying to associate with Zell, but he was trying to get into the inside of Zell's business so that he might [1884] obtain information by deception that he could use against somebody else. Well, now, if people practice deception out of the court, and off the witness stand, the habit grows. How can you tell that he didn't practice the same deception when he appeared before you during the course of this trial? Deception?

Hypocrisy? This case is really rife with both of them. These men didn't stop with trying to deceive their neighbor. From 1946 until 1953 they are parties to income tax returns which don't speak the truth.

Mr. Leahy: I object to that statement, if Your Honor please.

The Court: Objection sustained.

Mr. Denit: The income tax return of the Webster Motor Car Company for the 1949 is consolidated with an income tax return for the Somerset Seafood Company. In the return and Schedule F you will see typewritten, Compensation of officers, Richard C. Webster, Baltimore, Maryland, chairman of board. Time devoted to business underneath that, Full. Did he devote his full time to the business? You heard him testify. Could his testimony be true, and this income tax return be true? There is no compulsion of filing a return like that unless the facts were correctly stated. The corporation got the benefit of the deduction [1885] from its gross income by the allowance of that salary to him on the basis of the full time devoted to the business of the company. In 1952 the Webster Motor Car Company filed a separate income tax return, not a consolidated one, for the Somerset Seafood, and in Schedule E under compensation of officers, it is shown that Richard C. Webster as chairman of the board devoted full time to the business and received $9,352. The Somerset Seafood Company filed a separate return for the same year, and in Schedule E the name Richard C. Webster appears as chairman of the board, devoting his full time to the business and receiving a salary of $2,850. Well, none of us have more than 100 per cent time, do we? If we devote 100 per cent of our time to this business, then we can't devote 100 per cent of our time to another business, can we? That's the

kind of people the Websters are. Then they talk about assurances. The only thing they have made sure in this case is that Packard was lucky that it didn't have to rely upon their assurances for the future performance. Now we go a step further. After they had had in their possession, No. 1, a contract to extend their dealership to July 1, 1952, and No. 2, a contract to extend their dealership to March 31, 1953, they employ lawyers who write to [1886] Packard asking for a conference. The expression in the letter is that, We would appreciate it if you or your counsel would confer with us about the matter. That matter was referred by Mr. Beck to the Detroit office with the result that Mr. Armstrong and Mr. Abernethy through Mr. Beck arranged time to meet in Mr. Leahy's office to discuss this matter. Now, you heard the testimony of the witnesses with respect to that. You are compelled to make a selection between which witness or witnesses you are persuaded told you what more probably occurred. Mr. Abernethy told you that after being detained by Mr. Donald Webster first in a sort of a challenging way as if they were military men who had exceeded bounds and were questioned by the sentries, and then as students sitting at the feet of the master while he expounded on the antitrust laws, they finally got down to the business for which they came. Mr. Abernethy, after the steaming up, as he characterized it, on both sides, said in substance, Now, look, I am vice president, assistant sales manager of Packard Motor Car Company. I am authorized to sign your renewal contract. You are vice president of the Webster Motor Car Company. We are here together. We can sign this agreement and that will be the end of the matter. Then he was asked what assurance can we have if we [1887] sign this March 31, 1953 renewal it will be renewed thereafter or that you will not

try to find some scheme or device in the meantime to cut us off and make Zell sole dealer? [1888] Mr. Abernethy said in such a way that I am quite sure it received conviction in your minds, We will give you the assurance that we give every other dealer. This is our standard form of contract which we use with everybody. But I will give you my personal assurance that your desire or purpose to renew at the expiration of this period of time will receive the same consideration that it had always received. Now, ladies and gentlemen of the jury, that's exactly what had happened between Webster and Packard since 1946. They never had had any written assurance or any other kind of assurance that their contract would be extended, but it was always extended, depending upon the conditions then existing. Mr. Armstrong corroborated Mr. Abernethy's version of the conference almost from beginning to end. There are certain details in which they are not exactly the same, but the import of the whole thing is that on May 20, 1952 in Mr. Leahy's office, Packard expressed its willingness to renew without any strange tie-up to the renewal. Both of these men said they believed in their heart honestly that any applications of renewal beyond March 31, 1953 would be treated on its merits in the light of conditions and circumstances then existing. At that time Mr. Armstrong told you there was no [1889] outstanding commitment agreement or any other form of understanding with Mr. Zell that he would be made the sole dealer in Baltimore. He told you the reason why. He told you that Mr. Beck's letter had prevented that from being done, and that the company was bound, whether it liked it or not, on the recommendation of its manager to give Webster a renewal of '53, and at the end of '53, then the whole matter would have to be determined on its merits in the light of the conditions then existing. Now, you

know the reason why that kind of thing is necessary in a big business of this sort. Conditions in 24 hours could so change in the automobile industry that it might be absolutely impossible for the manufacturer to adhere to a plan previously adopted, plans as to envisage the future. Planning has to take into consideration economic conditions then existing. Planning has to take into consideration the engineering data that have been relied upon to make a car. Planning has to take into consideration all those eye-catching devices that are installed on automobiles so that they will be attractive to the public. Planning has to take into consideration provision for capital so that the industry can function in accordance with its production schedule. All of those things are factors which the experience of these men has indicated required them to limit their commitments to all dealers on a one-year basis. [1890] That's exactly what they were giving Webster. That's exactly what they had given to Webster in the past. What did Donald Webster do? Did he look them in the eye and say, No, we have already gotten plans for what we are going to do with Packard. It doesn't contemplate that we are going to be a dealer of Packard. We are going to reject what you offer to us now. We are not going to take what my father said. We are going to sue under the antitrust laws. He didn't say any of those things. He shifted away from direct contact and said, Our board of directors will have to consider this, and we will meet in approximately a week. Now the board of directors of the Webster Motor Car Company never met. It was a family enterprise. They discussed their problems probably at home, over the telephone, in the office, whenever they happened to be together. But Donald Webster made it appear that there was going to be a formal proceeding, a formal meet-

ing, where they would consider this matter, and then would let Packard know. Did he ever make good on his promise? You know the answer to that question. He had Mr. Leahy write another letter to Mr. Marshall Beck in which Mr. Leahy said in effect, You gave me oral assurances. Now put it in writing. Packard replied, We don't make side assurances on [1891] any contracts. Our contracts speak for themselves. All dealers are treated alike and we must act upon renewals in accordance with the circumstances existing at the time the contract terminated. Now all of that's reasonable, isn't it? If you can't make a side agreement that you can keep, there would be no sense in an undertaking to make it. That's exactly what they told Donald Webster. In the meantime he was grinding the wheels to get his antitrust suit under way. And another aspect of deception and hypocrisy in this case on the part of the Webster organization is their continuation to deal after March 31, 1952. Technically and reasonably from the point of view of the lawyer in the Webster family, they had no right to display a dealer sign after March 31, 1952, except as an incident in closing out the business. Technically they had no right to a dealer's price on cars. Technically, they had no right to a dealer's price on accessories or parts. But they continued to use the dealer forms that Packard sent them. And on those forms they ordered the automobiles and the parts and the accessories, and they received them as dealers as late as September, 1952, the last big quantity coming as a result of orders in March and April of 1952. [1892] You heard the evidence, ladies and gentlemen of the jury. Probably $100,000 worth of merchandise in the form of cars, parts and accessories were purchased by the Webster organization after their dealer contract had terminated on March 31, 1952.

Now, weren't they thereby indicating to Packard that they were seriously, honestly and in good faith considering an extension of their dealership? The answer is obvious, isn't it. But instead of that they sit back, say nothing and continue to manufacture their case, a claim against Packard and Zell under the antitrust laws. That indicates where the good faith in this case lies. And there is no answer to it. Eventually, the people who had been importuned to granting an extension, the people to whom Webster had cried I love your organization and I want to stay with it until I die, lost their patience. They wrote a letter in which they said, We will give you until July 11, 1952 to sign the dealer contract or it will terminate of its own terms. Then there was a request for assurance. Mr. Beck was instructed to write there would be no assurances, no commitments, other than those which are implicit in the dealer's sales contract, take it or leave it. And they did not renew it. Now, whose fault was it that thereafter the Webster [1893] organization discontinued as an automobile dealer? Was it Packard's fault? Can you find in this evidence that Packard did anything to require Webster to go out of the automobile business? No, it was Webster's fault. Webster had the free, voluntary choice of receiving the same kind of a contract that it held for years, continuing in business as such, and the probability is if that contract had been accepted, Webster would still be in the automobile business if he so desired. I put in "if he so desired" there purposely, because, ladies and gentlemen of the jury, there must be something very evident to you in running through this whole course of evidence. Mr. Webster was getting tired of the automobile business. The son upon whom he might depend to step into his shoes didn't like the auto-

mobile business. He wanted to be in the law business. Mr. Webster was living 140 miles away from his place of business. And from what I know of Salisbury he made a wise choice because it is a delightful place and far more acceptable to a person who wants to live quietly than the rattling streets of Baltimore. Mr. Webster was withdrawing his capital from the automobile business and putting it into the seafood business because, Where your treasury will be, there will be your heart also. He loved that business, and you can see from his appearance that the effect of the sunshine and wind has [1894] made him a wealthy, well-preserved gentleman at this state. His selection as far as Mr. Webster personally was concerned was undoubtedly one that he was wanting for years and eventually it ripened into fulfillment. He didn't intend to continue in the automobile business. He was willing to have his name connected with the company to whom he could sell, and he was willing to be a so-called pensioner with this company and receive $15,000 worth of consultation and advice. But so far as getting on the pavement and selling automobiles were concerned, he didn't have the enthusiasm. He didn't have the energy. He didn't have the patience, and he didn't have the drive that is required. Namely, the necessity for making a living, because he had already accumulated it. As a matter of fact, he was the owner, according to the records in this case, not only of all of the stock of the Webster Motor Car Company, which controlled and owned all of the stock of the seafood business, but he was the owner of the real estate on which the Webster Motor Car Company had its operations. That is, he was the owner of the controlling stock of the corporations, and through those three corporations he had an assured income which would relieve him from worry and care in his later years. Now, there is still another

aspect of this case, [1895] a little more technical, and that is the aspect of what all of this has meant upon the public and interstate commerce. I refer briefly to the fact that there was no evidence in the case to warrant anybody concluding that anything that was done here operated to restrain interstate commerce, because as a result of making Zell the sole dealer in Baltimore, approximately 125 more Packard cars were sold in Baltimore in 1953 than Webster and Zell combined sold in 1952. So that you have more merchandise moving in interstate commerce instead of restricting it. What was done was not to create a monopoly. As a matter of fact, it is almost impossible to create a monopoly in the sale of automobiles. The competitor always takes care of that. Even if you take into consideration the fact that Zell became ultimately the sole dealer in Baltimore, that didn't mean that all Packard cars had to be bought from Zell. The evidence in this case uncontradicted and undenied is that 110 people living in the Baltimore area bought Packard automobiles from dealers other than Zell. So that Zell had no monopoly. Nobody was compelled to buy it from him. The fact of them making him a sole dealer did not add one cent to the cost of a single automobile to any member of the public. [1896] As a matter of fact, the uncontradicted evidence in this case shows that of the two organizations, Zell and Webster, the public got the more liberal transaction out of Zell all the time, and that the amount of profit which Zell retained out of the sale of a new car or a used car trade was considerably less year after year than the amount of profit which Webster retained. That's the reason why Mr. Briggs said in his testimony that Webster is what we call in the automobile business a creamer. You know

what it is to take the cream from the top of the bottle. You get the best. Mr. Webster in his case would resell the used car and make a profit on that, and give his customer only a small portion of the profit that he made on his new car, so that a customer dealing with Webster got less of a break than he would, say, in the language of the street, than a customer dealing with Zell. And that is shown uncontradictedly by the evidence in this case. So far as injury to Webster is concerned, the record here is another demonstration that Webster did not sustain any injury as a result of anything done by Packard. On the contrary, the evidence in this case shows that in 1953 and in 1954, dealers whose potential sales and performance were comparable to Webster operated in the red all over the eastern division of the Packard sales territory. As a matter of fact, only two dealers had an operating profit in 1954. [1897] All the rest of them were operating at a loss. Now, is it likely, therefore, that Webster's fate would have been any different? The same thing was true in 1953. Look at the number of dealers who were operating in the red. In 1952 there were a considerable number, but not anywhere near approaching those in 1953 and 1954. In 1951 there were a lesser number operating in the red. The point being, ladies and gentlemen, that from 1951 down, those dealers comparable to Webster were operating in the red and losing money rather than making money. So that even if you assume that Packard was responsible for Webster not being a dealer in 1953 and 1954, these figures show that it is very unlikely Webster would have made any profit. On the contrary, he would have lost money. We might even be bringing a suit against him for counter claim in this case.

* * *

[1898] (At the bench:)

Mr. Denit: If the Court please, I wanted to make a reference to the Baltimore proceeding and the order taken in the case, to state the terms of the order which was entered by the District Court.

The Court: No, I have ruled on that as a matter of law. There is nothing before the jury on the basis of that order.

Mr. Denit: Did Your Honor exclude the sixth defense?

The Court: Oh, no. I ruled that the sixth defense involves a question of law and that it was insufficient.

Mr. Denit: Then we would not be permitted to comment on this at all?

The Court: No. I ruled on it as a question of law.

Mr. Smith: I understood that Your Honor's ruling with respect to the sixth defense is merely a ruling denying our motion for a directed verdict based on the sixth defense.

The Court: I now rule that it is insufficient. Let's see. The order is in evidence. I rule that the sixth [1899] defense presents merely a question of law, no question for the jury. I ruled to be sure in disposing of a motion for a directed verdict that the defense was not sufficiently established. I did indicate that I looked upon it as a question of law, that there was no question of fact for the jury.

Mr. Denit: And therefore I cannot comment on it in the argument to the jury?

The Court: I hold that this order is not a release of Zell and therefore it doesn't operate as a release of the joint tort feasor.

Mr. Denit: We could not comment upon it to the jury?

The Court: No.

* * *

(In open court:)

Mr. Denit: If it please Your Honor, and you ladies and gentlemen of the jury, before the luncheon recess we were commenting upon these tables showing potential performance of dealers comparable to Webster.

[1900] The Court: Mr. Denit, may I suggest for acoustical reasons it is difficult to hear you when your back is turned, and the reporters have had difficulty with both counsel.

Mr. Denit: I simply want to call your attention to the fact that these tabulations were made from these dealer statements. They are not statements made by Packard, but they are statements furnished by the individual dealer to Packard concerning its performance during the period indicated. Therefore the tabulation is really a result of putting into composite form the information furnished by the dealers themselves, which is not independently collected by Packard but is the dealer's own permanent record of his performance. One further reference to arithmetic, and by that I mean a composite statement of the annual average automotive profits of Webster Motor Car Company, as disclosed by its dealers' statements returned to Packard for the year 1950 its profits per books were $9,757. Other income, meaning dividends and interest on securities, and gain realized on sale of securities, amounted to $3,505. Its

automotive profits, therefore, for the year 1950 were $6,251. For 1951, its automotive profits were $1,834. Or a total for the two years of $8,085, divided by two to get the average. [1901] Its average annual automotive profit for those two years was $4,042; and that is the profit which the books of Webster show to have been earned from the automotive business. One further matter indicating the attitude of Webster as distinguished from his attitude in this court room. On February 26, 1954, Mr. Richard Webster wrote this letter to Mr. Roy Abernethy, who was the vice president of Kaiser Motor Company:

> "My dear Roy: I know you will be surprised to receive this letter from me. I could not let your fine television and address go by without telling you how much I enjoyed it, and how much better it was than any of the previous Autolite programs. The old Macauley Packard conservatism in the presentation, the absence of rash claims and the eye appeal were commented on by some of my friends the next day. Another reason why I am writing you, Roy, it to tell you that the part you played in the disenfranchisement of our company in Baltimore and its subsequent liquidation were due to those above you at the factory, and, that it was not due to your own free choice, is our honest belief. Documents so far produced bear out this statement."

At the time the "documents so far produced" referred [1902] to are concerned, Mr. Beck's deposition had been taken, and it was disclosed by those documents that neither Mr. Abernethy nor Mr. Beck were responsible for the decision made to make Baltimore a one-dealer city. And that

was the honest belief of Mr. Richard Webster in February, 1954. Yet you have witnessed a spectacle of having Beck's deposition read for two and a half days, and approximately the whole of a court day devoted to the cross-examination of Mr. Abernethy calculated to discredit him. Where do you think the truth lies? And now, finally, it is our conviction, based upon a review of all the evidence in this case, that the decision made by Packard was a decision which was calculated to serve the best interests of Packard and the people upon whom Packard relied. The decision involved preserving Packard's business in an area where it was committed and had been for years. It was a decision based upon sound considerations of business policy. It was an independent decision reached upon consideration of the factors which I have discussed with you today, and about which you have heard evidence over these many, many days. It was no conspiracy, contract, or combination between Packard and Zell. Packard was faced with the necessity of preserving its business situation, its competitive position in an area where it had a right to be and in which it [1903] had transacted business over a period of many, many years. Analyzing this evidence from the standpoint of reason and common sense, looking at the witnesses who have been produced on one side or the other, weighing their testimony in the light of its inherent probability, we submit to you that a verdict in this case ought to be in favor of the defendants because a verdict based upon the realities of the case, as distinguished from inflammatory speeches, necessarily means that you should not impose damages against this concern or its two officers who have merely pursued a legitimate, honest business policy. Thank you very much.

ARGUMENT IN REBUTTAL ON BEHALF OF THE PLAINTIFFS

Mr. Leahy: May it please Your Honor, and you ladies and gentlemen of the jury: I am both surprised and disappointed in listening to the argument which you have just heard for the past hour and forty to fifty minutes. I did not think Packard, to sustain the position which it took in this case, would descend to the level of calling everybody names, liars, cheats, frauds, deceivers. You saw Mr. Webster. Yes, he is a hard-working man. He has worked hard all of his life for the company who now calls him a fraud, a crook, a deceiver and a cheat. You saw Mr. French, the president of the plaintiff [1904] company. You saw also his son who, because as a lawyer and who at the time these happenings were occurring was in our Department of Justice as an attorney, is now submitted to the abuse, too, of being a liar. I had hoped we might have this argument upon a dignified level where the evidence in the case would be analyzed in accordance with the importance at least of this case so far as the plaintiff is concerned. He had a business. He has none. Packard refused even to answer one of his letters. Packard refused to do aught but deceive him. The company for which he had given his life refused to deal with him in any other manner than which you have heard they dealt in this argument just submitted to you. So if you wanted any proof whatsoever to establish the truth of what we said in this testimony, and what these witnesses testified on the stand, you have it in the arrogant, disdainful, monopolistic attitude that Packard showed you in this argument. Wouldn't you like to have been Mr. DeBaugh? Wouldn't you like to have been the plaintiff in this case, with the t most powerful opponents that you can imagine to the right to exist as a business man against

you? Yes, we saw those pictures you saw. We saw where one man was able to show a building with 70,000 square feet, [1905] where we had something like 3,500 square feet; but he didn't tell you that the man with the 70,000 square feet of space had a quota of 400 cars, and we with our 3,800 square feet had a quota of 175, and yet the little, insignificant, despised, abused Webster sold half as many as that grand man who on the opening statement the same attorney promises that you would see upon this witness stand. Did you see him? [1906] Now, I don't mind that, because always every lawyer who has no case on the facts will talk about the law, if he can. If he doesn't do that then he descends to abuse and goes into personalities, which of course isn't anything new. That's what Hitler did. That's what Stalin did. Don't defend yourself but call your opponent a crook, and a deceiver, and in that way distract attention from the facts, but he better be sure he has the facts. He said Schulte had nothing to do with this; that we never tried to terminate Schulte's contract. Whoever said that we did say that? Who was it introduced, for instance, as one of the exhibits in the case, the mutual cancellation agreement of Schulte? We didn't argue anything to you about Schulte's termination. We argued to you that Zell didn't want to refill Schulte's place. And it wasn't Schulte that was terminated; it was the dealership that was terminated. And why? So that there might be the elimination of Schulte's competition, and the complaint which was given to you so long ago that perhaps just a moment of refreshing your memory will give you what it was that Zell was talking about. Now, let's forget that I am doing any talking here. [1907] All you want now are the facts as they occurred at the time. What did Mr. Beck tell you? You remember that as early as July 11, I showed

you a letter, Zell was inquiring about how many dealerships there were in there. He was objecting to competition. I showed you that. I showed it to Beck when I took his deposition, you remember. Yes, we read it. Why? Because this fair-dealing Packard, this company which had met up in New York or up in Detroit on this decision which had to be made as they said, with deliberation and care, of course, for your interest and mine, and they finally decided that they would go along with program initiated by this man. I was trying to find out something about the facts in this case. Talk about deceit. Do you know that not until this trial has Packard ever disclosed anything about that meeting in New York. Do you know never has it ever told anybody about it? And this great, good man Beck that went down there to see Mr. Webster, his old friend. Why, he called him Dick. Why didn't he tell Dick. You know only last month, no, two weeks before, I was in New York, January 29th. And Zell put the proposition up to us that he would have to make Baltimore a one man, one dealer city, and he would have to be the dealer or else he was going to quit. And if we do [1908] that for him he will increase his facilities, he would increase the number of his helpers and salesmen, and he would do all that. We took it under advisement, Dick, for a couple of weeks. We went over the situation very carefully, and we had a problem that we had to solve, a problem that required our discussion of this matter from the standpoint of the best interests of Packard and those whom it represented. Now, I am quoting counsel. We had to do that, Dick. And finally we came to the conclusion that you are a dead duck. You are out. You are not going to be a Packard representative any more. Did he say that? Did he come out frankly and tell him anything about that? He has never told Dick Webster that to this day, and neither has anybody from Packard.

"Q. Now, he says, 'From our conversation yesterday you know our definite feelings.' "

That's out of the letter of July 11th.

"Do you know what they were back there in 1951?"

Now I am talking about before there is any trial. This is just what we are trying to see, as to what the facts were.

"A. He had constantly threatened to give up, to go out of the Packard business.

"Q. What were his definite feelings that he says? A. That he was going out of business."

Zell had that in his mind always for the purpose [1909] of cutting down competition. Don't let counsel befuddle your minds on that. Is there any doubt about it? When he had accomplished his purpose, and when finally Baltimore had been made a one dealer city, what's the ad he puts in here? They tried to tell you the public wasn't involved, that competition wasn't involved. What is the ad?

"Automobile salesmen. Only top quality men will be considered. No multiple dealer competition."

That is an advertisement on the 12th day of March, 1953. What is all this talk he was going out of business, and that they had to take him out of the red? He is still in the red, and he is still in business. Just how far do they think they can pull the wool over the jury's eyes? Take this one:

"Automobile salesmen. This advertisement is directed to two experienced, ambitious, energetic

men who are tired of multiple dealership competition."

Take another one:

> "Automobile salesmen. Take advantage of this opportunity to make a lifetime connection with Maryland's oldest dealer sales department. Enjoy top bracket income merchandising the fastest selling, lowest sales resistance cars ever afforded the American public."

[1910] This advertisement is directed to two experienced, ambitious, energetic men who are tired of multiple dealership competition. I won't take your time with reading the others. What he wanted to do was to eliminate competition, and he eliminated not Schulte, but the Schulte dealership. If you have any doubt whatsoever as to the facts of the matter that that was exactly what was done, take Platfoot's own statement. This is away back in September, 1951. Counsel this morning said, Didn't you hear Mr. Porter was attempting to find a new dealer. Yes, he was until Zell had the party at the golf club in Baltimore. Then what do we find? Within four days a complete turnabout face.

> "Due to the fact that Mr. Zell is familiar with this mutual cancellation from Schulte Motor Sales, Incorporated, he was very much interested in knowing whether we were going to put another dealer in Baltimore because he wanted to make his plans immediately."

Not what were his plans. What was the threat? Listen to what you are going to hear in New York in a couple of months. His plans were, and I am reading:

"By that he meant he would give us the Packard franchise."

Every time he meets a Packard man he talks about [1911] giving up the Packard franchise.

"Because here to date the return on his investment has been very small, and with the possibility of a shortage of cars, he feels he would lose money."

Exactly what he said in New York. Not what was this? This was his feeler. If he could eliminate this man Schulte upon the threat that he was going to retire from business, then he felt that he could go the full way if Schulte's elimination were granted, and get the elimination of all dealers. And for it he would make the glowing promise that he would take care of the situation in Baltimore. He would increase his facilities and so forth. The proposition was then taken to Detroit to think over. There wasn't any question of selection. Don't be fooled on that. You remember Armstrong tipped that off to you on the witness stand. He said he had a Hobson's choice and a selection to make. I said, Mr. Armstrong, did Mr. Zell at any time mention anything to you in New York that you had to select between Mr. Webster and Mr. Zell. He had to admit, No, because he hadn't. What happened with Platfoot?

"This I agreed upon."

In those days they weren't afraid of saying "agreed," because an agreement does constitute a meeting of the minds, and [1912] a common understanding upon a common purpose or objective. And you heard Beck when he had agreed to use the word "agreed" in his deposition, and he asked to correct it. And when I said, You have seen your counsel, haven't you, he said, Yes. And you want to eliminate the word "agreed," don't you? He said, Yes.

[1913] Of course they do. Because you heard counsel argue, there is no conspiracy, no contract, no agreement. There was an agreement throughout on the request of Zell. In this case it is just as clear as it can be possibly made without dispute or contradiction that Zell made the proposition on the 29th day of January in New York that you get rid of these others here in Baltimore or I'm going to quit. If you agree to get rid of those others in Baltimore, then I will do this and the other thing. They said, We will think it over. Come February 11th they replied that they had agreed, and I am using the words of Mr. Briggs, "We agree to go along on the program." You have heard a great deal of talk too about Beck going down there and Webster having agreed with Beck the first time when he came down there, telling him nothing about the truth of the situation. Why couldn't Dick Webster, if he wanted to, assuming that he did change his mind? What was he getting out of this? Absolutely nothing. And because he defends his own interests, because he says he has a right to file this lawsuit under the law as it is, then he is abused and it is said that he goes back on his word. Who is DeBaugh? He sold only ten cars. Let's not renew the fellow. You heard why he didn't join in the lawsuit. It wasn't under the same counsel at all. He told you he had been so shell-shocked in World War I that he couldn't go on in [1914] the case in court, and that it was going to be very expensive. Why ridicule the man because he sold six or eight or ten cars. It was $5,000 or $6,000 or $7,000 a year. And he had a son in business with him. Isn't it worth it to a man in that shape to have a guarantee of at least that much, $5,000 or $6,000 or $7,000, or must he be ridiculed in front of a jury? You heard Briggs say it right there with a snap of his fingers, Oh, I didn't care about DeBaugh. He was so small we didn't even take him

into consideration. But they did take Dick Webster, their friend, the man they used, the master salesman of Packards in the world over a period of years, who had always been the only one in Baltimore of any size who was always in the black. Zell was always in the red. And they have never yet told that man one single thing of what transpired in New York, or what their purpose was, or the reason for it. Why? If they were fair and above-board and honest in this transaction, don't you think for a moment they would have told him just as Braden told DeBaugh when things were bad back in '48 or '47, and when he went there to DeBaugh and said, Look, I haven't got cars to give you, Old Man. Hang on, we will give you all the parts. Hang on as best you can. Then when the cars come in, you will be back again. You don't see that kind of dealing. Why? Because that honest straight-forward dealing between the manufacturer [1915] and the men underneath is the kind of mutuality of relationship which Braden spoke about in his deposition, not here. Now, they said, Well, what did Zell care about DeBaugh? He was so insignificant. He played such a little part that when the poor chap on the date right here of 9/24/52 went up to Bel Air to look over the situation to see if he could get a dealership there, you remember how it was played up this morning that Beck had told him, Oh, hang on Old Fellow, and perhaps in another year you will get a dealership. A dealership against Zell. Did he want multiple dealership competition? What is it? There it is to Mr. Beck.

> "Remember DeBaugh in Towson? He is interested in Bel Air and he is going to contact the new owner of the Thompson building to see if he can make a deal."

What happened to him? A couple of weeks later:

> "Mr. Zell and Mr. Proctor do not approve of putting DeBaugh in Bel Air."

And no agreement. Perfectly fair, honest, independent decision made by this great manufacturer who controlled the dealers underneath him just the way a man controls anyone who must work for him and depend upon his wages. Why, we are criticized because we didn't call Beck a liar. We don't deal in that language. Mr. Webster didn't write Packard and tell Mr. Beck he was a liar. He was [1916] dealing with a man who controlled the right to give him a franchise or not. Calling him names like that? He wrote him a letter on the 20th, and they say there was nothing here with regard to the 20th, trying to find out what's going on. He says right here:

> "Are there existing circumstances in the Zell organization necessitating any such action as you suggest to be in my best interests?"

Why didn't he answer? Why didn't he tell him then. We had just had this meeting on the 29th. Why didn't he give him the story about Zell? If he had been straight forward, wouldn't he have done it? Why try to conceal? Why try to deceive? Why send to little DeBaugh two men to say, We have decided to close up the small dealers because it costs as much to keep the small dealer open as it does a big dealer. Can you imagine two men going over from Packard? I told you that now you can believe what all of this indicates by its necessary implication, this contemporaneous evidence, that a company would stoop to conceal from DeBaugh the way in which they did, and who would refuse to tell Dick Webster who had been with them for

30 years, the truth, can't be relied upon now to give the testimony in accordance with its fair implications. It is a queer twist that there was now a necessity [1917] to select. Don't you see how they fall down? Let's take them at their word. Let's say they had a Hobson's choice. Here you have heard Webster. He didn't have facilities. He didn't have capital. He was never on the job. He was away. You couldn't find him in business. He didn't have enough energy. His salesmen didn't get out and get in competition with other dealers, with other makes. Then why did they offer him a franchise? Why did they want him back? Don't you see how they have run into inconsistencies? You have got to be above board. You have got to play the game with the cards on the table, or you are going to run into some trouble. And they run into trouble every which way they turn. And here's the amazing thing. Here is something you haven't heard yet, because really we kind of felt they were going to fall down on this. I said, Why did they on the 2nd of June offer this franchise to Webster if Webster was such a bad dealer as they paint him to be? Why Webster suddenly became somebody who wasn't worth anything. I just told you that every other agreement they had with Webster was for 175 quota. Take a look and see what that quota is. 291. 60 per cent raise. In other words, they thought Webster was good enough on June 2, 1951 or '52, when they offered him that franchise [1917a] on April 22nd, they considered him then to be of such energy, with capital, salesmen, plenty of space, so they almost doubled his quota. Was that put in good faith or was it put in there so that if he didn't make the quota they could cancel it on March 31, 1953? [1918] Here is something else they completely forgot. I was asking Beck about that on the question of good faith. You remember in the letter which we wrote on the 10th of June asking them to

give us assurances, not that they reappoint us. We didn't ask for that. They have a right, of course, to cancel out any dealership if they find that it can't possibly make financial success, if for some reason they can't make it go. We didn't ask for that. We only asked for the same kind of treatment they were giving every other dealer in the United States, and the same kind of treatment they had given us. But we suspected they had an understanding with Zell that they give us this particular franchise for the reason that on April 15th they received a letter that we had been retained to look into the question of filing a suit under the antitrust act. Within three days they were over there with this agreement. What was it? Blank. Good thing. Then they come back on the 22nd with this agreement with the quota raised, contrary to everything you heard argued to you this morning, contrary to every inference and implication which was read into this testimony by counsel for Packard this morning. Here is where the death sentence was to be postponed until the 31st day of March, 1953.

"Q. Did you ever discuss with Zell at or prior to March 21, 1952, that it might be necessary [1919] for Packard——"

Listen.

"—to renew the Webster dealership for another year, but that he, meaning you, would terminate or see to the termination of that franchise during the year or at least at the end of the ensuing year? A. I personally never told him that.

"Q. Do you know whether anybody did? A. I do not.

"Q. Never heard of that discussed? A. Not to my recollection, although I have a faint recollection that a subject like that was discussed.

"Q. By whom, do you know? A. By Mr. Fenn and other Packard officials.

"Q. Do you know what other Packard officials were present? A. No, I do not.

"Q. Was Zell present with Fenn? A. Yes, I believe he was.

"Q. You don't know when, however, whether it was on the occasion of Fenn's visit as indicated by Porter's dealer contract report with the Zell Motor Company, on or about 3-18-52? A. No, I have no recollection.

[1920] "Q. But you do recall that you had heard that Mr. Fenn and Mr. Zell and some others of the Packard officials had discussed that subject? A. Yes."

Now you know why the Packard agreement was submitted, because they had already been threatened with this lawsuit. They could buy off the lawsuit by giving this particular contract. He said, Are you going to deny that Abernethy and that Briggs told you what the actual fact was? Yes, we deny it because of this reason: There is only one man who made a report on that March 20th conference. Now I am going to read you why they claim that. You heard Briggs and you heard Abernethy and you heard Armstrong, and you heard the latter two say that they came down just to get a renewal of a contract, while all they had to do if they wanted to renew in good faith was to say so. Did they come for that purpose? They talked all about Donald having gone over the history of his father's life with them. Now this was written away back in May 20th, 1952.

"The purpose of the conference was to find out just what the Webster Motor Car Company had in-

tended to do, and what their specific charges would be in their threatened lawsuit."

[1921] That's why they came. And on May 6th I had written to them, counsel for the defendants said that I had asked to see either the officers of the company or the attorneys. He was just about as right on that as he was on numerous other mistakes that he made. Here is my letter of May 6th:

"Confirming our conversation with you of today, I think the most constructive approach to the Webster Motor Car matter would be for you to put your counsel in touch with us as soon as convenience will permit and then we as lawyers could look into the matter further."

That was my request. Then the two men came down for the purpose of finding out what was our intention, and for no other purpose, because if the sole purpose was to sign the agreement, don't you suppose it would be in that report made at the time? Why didn't they have their counsel there? Because they talked long distance with counsel, Beck here, Armstrong, with one of the receivers on his car, and the attorneys with the other receivers.

The Court: Mr. Leahy, I have to remind you that your time has expired, so I hope you can come to a conclusion in a few minutes.

Mr. Leahy: I will comment on one other point, and [1922] that is the letter of June 11th, to tell whether or not that was in good faith. Here is our letter of June 11th. I had just, according to the letter, had lunch with Mr. Beck and Mr. Porter the day before. I am asking him this:

"I am wondering whether there is not some way by which the company itself could give us formal

> assurances along the lines above indicated. I am moved to this suggestion partly by intimation made by company representatives at our May 20th conference to the effect that Packard conceivably might wish to have one large dealer for the entire Baltimore area as it has in other metropolitan areas. Of course, this seemed directly applicable to the Zell situation and served to renew Webster's fears. As we are attempting to settle differences——"

Now they would have you think that all we wanted was a lawsuit, and we didn't file the lawsuit in 1953 until February.

> "As we are attempting to settle differences by entering into a renewal of a contractual relationship you will, I am sure, as a good businessman, see the desirability of clearing away all dead timber. The time to remove doubts and misgivings is now, before any renewal is signed. It is in this spirit that I [1923] am writing the present letter."

And we got back a typical Packard letter to the effect that no assurances would be given, and that the contract spoke for itself. I have the letter, but it's gotten away from me. Now I am sorry my time is up, and I cannot go into the question of damages, but I presume Your Honor will take care of it.

Charge to the Jury

[1924] The Court (Holtzoff, *J.*): Ladies and gentlemen of the jury: This long trial has now come to an end and the issues of fact are to be submitted to you for final decision. Your decision must be reached solely on the evi-

dence introduced at this trial. You must arrive at your conclusion deliberately, fairly, and impartially, without any feeling or emotion of any kind. The case has been ably and thoroughly presented by counsel on both sides. Of necessity a great deal of evidence, both oral and documentary, has been introduced by each party. This could not be avoided for a proper presentation of all the issues. Nevertheless, the issues to be decided by you are few and simple, and it will be my endeavor to simplify and reduce them to a minimum so as to facilitate your labors as much as possible. The plaintiff, Webster Motor Car Company, sues the defendants, Packard Motor Car Company and two of its officers, Marshall Beck and C. M. Porter, for damages which the plaintiff claims it sustained as a result of a violation of the antitrust laws, alleged to have been committed by the defendants. It now becomes your duty to determine, first, whether the plaintiff is entitled to recovery; and second, if the plaintiff is entitled to recover, then in what amount. [1925] As I have had occasion to explain to you in other cases in which you have participated during your term of service, it is my function and my duty to instruct the jury as to the rules of law that must govern the disposition of this case. You, ladies and gentlemen of the jury, are obligated to take the law from the Court, and to follow the Court's instructions as to the law. But on the other hand, you ladies and gentlemen of the jury, are the sole judges of the facts. You must determine the facts yourselves from the evidence introduced at this trial. The law authorizes the Court in its charge to the jury to discuss the evidence for the purpose of aiding and assisting the jury in arriving at its conclusions, but the Court's discussion of the evidence, and the Court's comments on the facts and on the evidence, are not binding on you and you need

attach to them only such weight as you deem wise and proper. If your recollection or your understanding of the evidence differs in any respect from the Court's recollection or the Court's understanding, then it is your recollection and your understanding that must prevail for, as I said to you a moment ago, you are the sole and final judges of the facts. My instructions are binding on you only as to the law. [1926] Now, I shall begin by reviewing a few general principles of law that are applicable to this case as well as others. The burden is on the plaintiff to prove his claim, or its claim, by a fair preponderance of the evidence. The words "preponderance of the evidence" mean that in order that you may find a verdict for the plaintiff, you must be reasonably satisfied that the plaintiff's allegations are true. This requirement does not mean that the plaintiff must produce a greater number of witnesses than the defendant, but as I have just stated, merely that you must be reasonably satisfied of the truth of the allegations, of the plaintiff's allegations. I can state the same thought in a somewhat different way. "Preponderance of the evidence" means evidence of greater convincing force. The duty of the jury is to weigh the evidence carefully as in a pair of scales, and to find a verdict for the party in whose favor the evidence preponderates, that is, on whose side the scale goes down. If the evidence is evenly balanced, then the verdict must be for the defendants. Now, previously to participating in this trial all of you were sitting on criminal cases during this term of service. In each criminal case you were instructed by the Court that the Government must prove its case against the defendant beyond a reasonable doubt. In order to prevent any [1927] confusion of thought the Court wants to make it clear to you that this rule does not apply to civil cases, and the case we are now

trying is a civil case, but as I have already informed you, in a civil case the plaintiff need make out his proof only by a preponderance of the evidence, or a fair preponderance of the evidence. In determining the issues of fact submitted to you you will consider and weigh the testimony of all the witnesses who have testified at this trial, all of the documents that have been introduced in evidence, as well as all the circumstances concerning which testimony has been introduced because circumstances frequently throw an illuminating light on oral or documentary testimony. You are the sole judges of the credibility of witnesses. I mean by that it is for you and you alone to determine what witnesses to believe, and the weight to be attached to the testimony of any witness. Several of the witnesses in this case did not personally testify in court. Their testimony was taken prior to the trial before a notary public, and the transcript of that testimony was read at the trial. Testimony taken in this manner is known in the law as a deposition. Such testimony is entitled to the same consideration and to the same judgment on your part with reference to its weight as is the testimony of witnesses who testified orally and in person on the witness stand. You are [1928] not to discount any testimony given by deposition merely because it comes to you in that form. This brings me to a consideration of the issues involved in this case, now that I have completed preliminarily a summary of a few general principles of law. The specific claim involved in this case is as follows: The plaintiff, Webster Motor Car Company, was a dealer in Packard cars under a contract, or a franchise, as it is sometimes called, with the defendant Packard Motor Car Company, the manufacturer. The plaintiff's place of business was located in Baltimore. In the same area there were

three other Packard dealers operating in the same manner as the plaintiff, under contract or franchises with the manufacturer. The plaintiff claims that one of these other dealers, the Zell Motor Car Company, entered into a conspiracy with the defendant, Packard Motor Car Company—that is an agreement with the defendant, Packard Motor Car Company—to eliminate all competing dealers in the Baltimore area, and to give the Zell Motor Car Company an exclusive right to the sale of Packard cars within the area. The plaintiff further claims that pursuant to this conspiracy or agreement, Packard refused to renew the plaintiff's contract, or franchise, as well as the contract or franchise of one other Packard dealer in this area, a man [1929] named DeBaugh, and it failed to fill the place of another dealer, Schulte, who had previously given up his business. The plaintiff further claims that Packard made, in effect, the Zell Motor Car Company the exclusive dealer for Packard cars in the Baltimore area. The plaintiff further claims that this conspiracy or agreement constituted a violation of the antitrust laws. The plaintiff seeks to recover damages caused to it as a result of being eliminated as a Packard dealer by means of such a conspiracy or agreement, and as a result of the consequent destruction of its business. It is for you to determine whether these facts have been established by a preponderance of the evidence. The defendants admit that Packard refused to renew the franchise of the plaintiff and of DeBaugh, and that it failed to fill the place of Schulte, and that it, in effect, granted to Zell Motor Car Company an exclusive opportunity to sell Packard automobiles in the Baltimore area. The defendant claims on the other hand that this was done in the exercise of permissible business judgment and discretion, and not pursuant to any illegal conspiracy or agreement with anyone else. The defendants make still two other contentions. First, Packard

claims that the plaintiff agreed to liquidate its business anyway; and second, the defendants call attention [1930] to the fact that Packard offered to the plaintiff a renewal of its contract for one year, which the plaintiff refused. The defendant seeks to draw the inference that it did not destroy the plaintiff's business but that the plaintiff refused to continue as a dealer. The plaintiff responds by saying and contending that the defendant's offer of a renewal was not made in good faith, but that it was advanced only after Packard had decided to make Zell the exclusive dealer in the Baltimore area, and only after Packard had announced to the plaintiff that the plaintiff would no longer be permitted to remain as a Packard dealer. Plaintiff further claims that when the plaintiff protested against the failure to renew its contract, the defendant purely in an effort to stave off litigation, offered a year's renewal with the secret intention, pursuant to an alleged agreement with Zell, to terminate the dealership at the end of another year. The plaintiff claims that this was a belated offer on the part of the defendant Packard, and was not made in good faith, and therefore does not detract from the fact that the defendant, Packard, destroyed the plaintiff's business. It is for you, ladies and gentlemen of the jury, to determine from the evidence in this case what the facts were as to these various contentions and whose contentions [1931] are true. This brings me to a discussion of the law that is applicable to this case. The pertinent provisions of the antitrust law, popularly known as the Sherman Act, that no doubt many of you have heard about from time to time, a[illegible] which govern the disposition of the plaintiff's claim, read as follows:

> "Every contract or conspiracy in restraint of trade or commerce among the several states is declared to be illegal." "Every person who shall monop-

olize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states shall be deemed guilty of a misdemeanor."

[1932] I shall read these two provisions again because they are brief, but important, and I am reading only the provisions that are pertinent to this case:

"Every contract or conspiracy in restraint of trade or commerce among the several states, is declared to be illegal."

And second:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, shall be deemed guilty of a misdemeanor."

The word "conspiracy" as used in the statute merely means an agreement to do an illegal act, namely, an agreement in restraint of interstate trade or commerce, or an agreement to monopolize or attempt to monopolize. In order to establish a right to recover damages the plaintiff under these statutory provisions must establish the following elements: First. That the defendants entered into a conspiracy, that is an agreement with someone in unreasonable restraint of trade, or a conspiracy with someone, that is an agreement with someone, to monopolize any part of trade or commerce. Second. That the trade or commerce affected by [1933] the unlawful conspiracy or agreement was interstate trade or commerce, and not merely trade or commerce within a single State. Third. That the unlawful conspiracy or agreement adversely affected the interests

of the public. Fourth. That as a result of actions taken pursuant to the unlawful conspiracy or agreement, the plaintiff was damaged. Now let me go back to each of these four elements and elaborate them somewhat. The first element is a conspiracy, that is, an agreement in unreasonable restraint of trade, or an agreement to monopolize any part of trade or commerce. The antitrust laws do not forbid every restraint of trade or commerce. They forbid only such restraints as are unreasonable. The second kind of conspiracy or agreement that is forbidden by the antitrust laws is a conspiracy or agreement to monopolize any part of trade or commerce. In order to recover the plaintiff is not required to prove both. The plaintiff must prove either one or the other, either an agreement to which the defendants were parties in unreasonable restraint of trade, or an agreement to which the defendants were parties to monopolize any part of trade or commerce. [1934] In this connection, it must be said that a business concern has a right to select its customers and has a right to sell its products to whomever it chooses, and it may choose one potential customer in preference to another. That is a part of the American system of free enterprise. There is, however, this important qualification. The right to select one's customers is a right that may be exercised without ulterior motives, free from compulsion, and without agreements with others that tend to restrain trade or to create a monopoly. The law prohibits the exercise of this right pursuant to an agreement, or arrangement or conspiracy between two or more individuals or two or more business concerns, to exclude other business concerns from trade or commerce, or to create a monopoly, or substantial monopoly, for one of the parties to the agreement, arrangement, or conspiracy. The plaintiff's contention in this case is, as I have indicated, that the defendants refused to renew the plaintiff's fran-

chise and sought to create an exclusive dealership, or a monopoly in one concern, not in the exercise of its best business judgment, but from ulterior motives, as a result of compulsion, or pressure, or an agreement with a competitor of the persons who were excluded from the field pursuant to the conspiracy. If a person enters into an illegal agreement, or conspiracy, in violation of the Sherman Law, his motive in so [1935] doing is immaterial. It makes no difference whether his motive was good or bad, whether he thought that what he was doing was permissible and was for the best interests of his business, or not. The law prohibits certain agreements in restraint of trade, or certain agreements that attempt to monopolize. The illegality is not affected by motives, good or bad. A good motive does not make an illegal agreement legal, and a bad motive does not make a legal agreement illegal. A bad intent or malice against the plaintiff need not be proved in order to justify a recovery in favor of the plaintiff. Coming to the second element that the plaintiff must establish, namely, that the trade or commerce affected by the alleged unlawful conspiracy or agreement, was interstate commerce, the undisputed facts are that the Packard cars referred to in this case were shipped from Detroit, Michigan, or from the District of Columbia to Baltimore, Maryland. Such shipments constitute interstate commerce. The plaintiff contends that the flow of this commerce and the transportation of cars between the factory in Detroit, or the zone office in Washington and the dealers in Baltimore, was affected and restrained by being diverted to a single dealer. If you find that there was an unlawful conspiracy [1936] to restrain trade, or to create a monopoly in this case, you also have a right to find that the trade or commerce that was affected was interstate commerce. Coming

now to the third element, namely, that the alleged unlawful conspiracy or agreement adversely affected the interests of the public, the plaintiff offered evidence tending to show that the public interest is promoted by competition among dealers in the same make of cars, since by such competition a prospective customer may choose as between dealers in an effort to get the best possible terms on such matters as allowances for used cars, better service, and the like. The defendant on the other hand claims that the only real competition is as between different makes of cars, and not between dealers in the same make of car and that, therefore, elimination or restraint of competition between dealers in the same make of car does not affect competition, and does not constitute a restraint of trade. What the fact is is for you to determine, ladies and gentlemen of the jury. The last element that the plaintiff must establish is that pursuant to the alleged unlawful conspiracy or agreement, the plaintiff was damaged. The plaintiff claims that its business was destroyed as a result of the alleged unlawful agreement or conspiracy between Packard and Zell. The defendant on the other hand claims that the [1937] plaintiff had agreed to liquidate his business in any event, and that further the plaintiff's business was discontinued as a result of the plaintiff's own choice in refusing to accept a renewal for another year. The plaintiff responds by saying that the refusal to accept the renewal was due to the fact that the offer of renewal was not made in good faith, and with a mental reservation to cancel the franchise at the end of another year. I have already referred to the respective contentions of the parties on this point in a little more detail. The facts are for you to determine. Now, ladies and gentlemen of the jury, if you decide the issues in favor of the defendant, that ends the case and you will bring in a verdict for the defendants. If you decide the issues in favor of the plaintiff, then you have to take still

a further step and determine the amount of damages that should be awarded to the plaintiff. The damages to be awarded by the jury should be in such amount as would in the opinion of the jury fairly and reasonably compensate the plaintiff for the financial or pecuniary loss to its business,—in other words the amount of money that the plaintiff lost in its business as a result of the illegal acts of the defendants. The jury may not merely speculate or guess at an amount, or fix an amount arbitrarily. The amount of damages [1938] to be awarded by the jury must be based on the evidence. The evidence must supply information from which the jury may determine as a matter of reasonable inference the amount that the plaintiff probably lost. This does not mean that the evidence must show the exact and precise sum of money that the plaintiff lost. Ordinarily it is impossible to make an exact computation. The law does not require the impossible. Otherwise the wrongdoer might entirely escape the liability of paying damages caused by his illegal acts. The law throws the risk of uncertainty on the wrongdoer rather than on the injured party, for otherwise the wrongdoer could profit at the expense of his victim. It is enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, even though the result may be only approximate. The jury has a right to form a reasonable and probable estimate, in the exercise of good sense and sound judgment, of the amount that will constitute fair and adequate compensation. The jury may make a just and reasonable estimate of the damage, based on the evidence, and render its verdict accordingly. The measure of damages in this case is what was the value of the plaintiff's business claimed to have been destroyed by the defendant's illegal acts. In order to arrive at such a valuation the jury may consider

the evidence of net profits that the plaintiff might have reasonably expected [1939] to make during a reasonable period of time following the illegal acts of the defendants, if such acts have prevented the plaintiff from realizing such profits. Now such profits are not necessarily the final and definite measure of damages but they are an element and a circumstance that the jury may consider, together with all the other facts and circumstances in the case, in determining the amount of damages that the plaintiff has sustained in its business. The plaintiff has offered proof which it says tends to show what profits might have reasonably been anticipated as of the date of the termination of its contract, namely, March 31, 1952. It introduced evidence to the effect that business at that time was at an upswing; that the plaintiff was making profits in 1952 at a greater rate than it had made in 1951; that the outlook for business was good because the year before Packard had put out a new model that was meeting with public favor. On the other hand the defendant has offered evidence to the effect that in 1953 many dealers of approximate the same size as the plaintiff, sustained a loss instead of making a profit. The plaintiff offered evidence from its books of account, through a certified public accountant, to the effect that during the period beginning in 1946 and ending March 31, [1940] 1952, the plaintiff's net profits from the automotive business averaged approximately $36,479 a year. I said "net profits"; I should have said "gross profits." In considering the number of years that the plaintiff would have continued in the automobile business except for the defendant's alleged illegal acts, the jury is entitled to consider the plaintiff's history of operations for the 15-year period between 1937 and 1952. The jury is also entitled to

consider testimony to the effect that franchises of efficient dealers are ordinarily renewed from year-to-year for a substantial period of time. You ladies and gentlemen of the jury are the sole judges of what period, if any, the plaintiff could reasonably have expected to continue in the automobile business were it not for the defendant's alleged illegal acts. At the time that Packard failed to renew Webster's contract, Webster's lease on its plant had seven and three-quarter years to run. Accordingly the plaintiff claims that it is entitled to recover damages on the basis that it would have continued in business for a period of at least seven and three-quarter more years. Whether that is so or not is for you to determine. The plaintiff claims that for the balance of the term of the lease it could have anticipated a total net profit of $259,760, using the same average profits as it had gained [1941] during the years immediately preceding 1952. In addition the plaintiff claims that it sustained a loss during the year in which it closed out its operations, a loss that it would not have sustained if its franchise had not been discontinued and it had been permitted to continue operations as it had done previously. The plaintiff claims that this loss amounted to $24,900. You have a right, if you see fit, to consider this as an additional item of damage, giving it such weight as you consider proper. The defendants on the other hand dispute the calculation of profits during the preceding years, that is, years preceding 1952. The defendants claim that all of Mr. Webster's salary as an officer of the company should be deducted from the gross profits, and by so doing the net profits would be reduced considerably. The plaintiff responds by contending that since the Webster Motor Car Company had other interests and activities than just the automotive business, and Mr. Webster devoted his personal attention to all aspects of the

company's interests, only a small portion of his salary should be charged to the automotive business, and that is what the certified public accountant has done. It is for you to determine what the fact was and how the matter should be handled. It is then claimed by the defendants that the [1942] average net profits for the years preceding 1952 are high because the years 1946, 1947 and 1948 were unusual years when there was a seller's market, and that the gross profits of the plaintiff were much greater in those years than they were in 1949, 1950 and 1951, and that according to the plaintiff's own statement, the plaintiff's profits in 1950 were only $15,000, and that according to the defendant's calculations they were even less. The plaintiff responds that one reason why the profits were down in 1949 and 1950 was the fact that a disastrous fire had been sustained by the plaintiff in its plant, and that therefore those two years were not typical, and that, moreover, beginning in 1951 there was a marked upswing and and increase in profits. All these matters are for you to consider. You are not bound by the figures introduced either by the plaintiff or by the defendants, but you may give these figures such weight as you deem wise and proper. You may use them as a basis to reach a figure by a process of approximation which, in your opinion, would fairly and reasonably compensate the plaintiff for the damages it has sustained, no more, but no less, if you bring in a verdict in favor of the plaintiff. In conclusion, your verdict should be either for the plaintiff for a specific amount of money, or a verdict [1943] in favor of the defendants. As of course you are aware, your verdict must be reached by unanimous vote. Are there any objections or requests? If so you may come to the bench.

(At the bench:)

The Court: Has the plaintiff anything?

Mr. Leahy: No, Your Honor.

The Court: Has the defendant anything?

Mr. Smith: Yes, Your Honor. The defendants object to the Court's failure to give an instruction as stated in each of defendants' prayers numbered 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34. May it be understood that this objection and this request shall have the same force and effect as if stated separately with respect to each of such instructions?

The Court: Yes.

Mr. Smith: And we now request each of those instructions, and I take it is unnecessary to state additional grounds. With respect to Your Honor's instruction as to the facts with respect to the refusal to renew, I understood Your Honor to state that defendants admit that it refused [1944] to renew Webster's agreement. Defendant's position is that it did not refuse to renew——

The Court: Well, at one time it refused, and then it offered to renew.

Mr. Smith: Well, I know, but I believe Your Honor's statement gives the impression that this case arises because of a refusal on the part of the defendant to renew. It does not, in our opinion. It arises because a renewal was offered and the plaintiff failed to accept.

Colloquy

The Court: I think I went into that at length.

Mr. Smith: With respect to conspiracy: Your Honor instructed the jury in one of his statements that a conspiracy is an agreement to monopolize any part of trade or commerce.

The Court: You don't have to repeat my instructions; just state what your objection is.

[1945] Mr. Smith: Our objection with respect to Your Honor's reading of the provisions of the antitrust law with respect to monopoly, and statements about monopoly which permit the case to go to the jury on the theory of a violation of the monopoly provisions (Section 2) of the Sherman Act; We believe that the charge in this case is not supported by, but on the contrary inconsistent with the evidence, and unsound as a matter of law. There can be no illegal monopoly in the products of one manufacturer where there are available substitutes. Moreover, there was no monopoly in Baltimore even in Packard products, as the evidence shows. I request Your Honor to give to the jury an instruction with respect to monopoly, which I now hand up.

The Court: It is too late to hand up requests. You had an opportunity to present requests for instructions, and you presented 32. Request for instructions must be presented prior to argument, as the rules provide.

Mr. Smith: We did not know, Your Honor, that Your Honor would instruct on monopoly.

The Court: Let me see your suggested instruction. Hand a copy to the other side. I shall deny it.

Mr. Smith: May we have it read into the record so that it will appear?

[1946] The Court: I will give it to the reporter. We won't stop now. The jury is waiting to go out, you know.

(Defendants' requested instruction reads as follows:)

"You may not bring in a verdict for plaintiff based upon a conclusion that Zell or any defendant has monopolized, or attempted to monopolize, or combined or conspired to monopolize any part of trade or commerce in violation of the antitrust laws."

Mr. Smith: Your Honor instructed the jury that although the law gives to a manufacturer the right to select customers, it prohibits the exercise of the right pursuant to an agreement to exclude others, or create a monopoly. We object to the instruction on the ground it is not sound as a matter of law. We object to the charge in so far as Your Honor failed to instruct the jury that plaintiffs must prove that the acts of the defendant caused a substantial interference with interstate commerce. We object to the charge in that it failed to instruct the jury that it is necessary for the plaintiff to prove that the purpose or inherent intent and effect of the acts complained of was to injure the public. Your Honor instructed that motive makes no difference; it makes no difference what defendants' motive was. We [1947] object to that on the ground we believe it is incorrect under the law. Your Honor instructed the jury that they may consider evidence of the profits that plaintiff might have been expected to make for a reasonable period after the acts complained of. We object to that as incorrect as a matter of law. Your Honor instructed that the plaintiff offered proof of profits it might reasonably have anticipated after March 31st, which I believe Your Honor described as the date of the acts

complained of. March 31st was merely the date of the expiration of the current agreement of Webster. Packard did nothing at that time. Webster lost its dealership as a result of its failure to accept a renewal. Your Honor instructed the jury that they may consider the value of the business claimed to have been destroyed. This is inconsistent with the theory on which plaintiffs' sued. It is inconsistent with the theory on which plaintiff and the defendants introduced the evidence. It is not supported by, but on the contrary inconsistent with the evidence, and is unsound as a matter of law. Your Honor instructed the jury that they may consider plaintiffs' claim of $24,812.97 for Nash losses. This is not supported by but on the contrary inconsistent with the [1948] evidence and unsound as a matter of law. Your Honor instructed the jury that they may consider the history of profitable operations and efficient management over a long period of time. This is irrelevant and immaterial. It involves abnormal years which are not indicative of the profits which could be made in the future. It is not supported by but on the contrary inconsistent with the evidence, and unsound as a matter of law. Your Honor instructed the jury that they could take into consideration the fact that ordinarily dealers receive renewal of their franchises. This is irrelevant and immaterial. It is not supported by but on the contrary inconsistent with the evidence, and unsound as a matter of law. If any such instruction is to be given we request that the attention of the jury also be called to the fact that the agreement under which Packard dealers operate is an agreement for a one-year term and there is no right of renewal. Your Honor instructed the jury that the plaintiff claims to have prospective profits as of March 31st of some——

The Court: I did not instruct the jury. I stated what I understood the plaintiffs' claim was, which isn't an instruction, exactly.

Mr. Smith: Well, we believe——

The Court: I stated to the jury they were claims.

[1949] Mr. Smith: We believe it is not proper for the jury to consider the profits which plaintiff anticipated that plaintiff would have over the remainder of the term of the lease. We object to Your Honor's failure to instruct the jury that under the antitrust laws the Court is required to multiply by three any damages awarded by the jury, and that if the jury returns a verdict for the plaintiff——

The Court: You covered that before, Mr. Smith.

Mr. Smith: Yes; that is our prayer No. 33, and we respectfully request the Court to give that prayer.

The Court: However, in view of the fact that you brought the matter up, I read the case on which you rely, Cape Cod Food Products v. National Cranberry Association, 119 Fed. Supp. 900, decided in the District of Massachusetts. It is quite apparent that in that district there is a practice to send the pleadings to the jury room with the jury, and for that reason it was necessary to apprise the jury of the fact that it was not to multiply the damages by three. In this District, I think I ought to inform you because you are not a member of the District of Columbia Bar, we do not hand pleadings to the jury in civil cases. We hand them the indictment in a criminal case, but not the pleadings in a civil case.

[1950] Mr. Smith: Your Honor, I think it is rather common knowledge,——

The Court: I do not permit argument at this stage, because the jury is waiting impatiently to go to the jury room.

Mr. Smith: I believe, although I would be glad to be corrected if I am wrong, that Your Honor has failed to direct that the jury bring in a verdict against the plaintiff and a verdict in favor of the defendant Howell.

The Court: You mean as to Richard Webster?

Mr. Smith: Yes.

The Court: I handle that, in a different way, after the verdict is brought in on the contested issues, then I take a directed verdict as to Richard Webster.

Mr. Smith: I request that the jury be instructed to disregard the statements of plaintiffs' counsel on summation which convey the impression that Schulte did not voluntarily give up his dealership.

The Court: I never comment in my charge to the jury on the summation of either counsel.

Mr. Smith: Our position is that they should be instructed to disregard it.

The Court: I never give such instructions. So long as I do not stop counsel from making a statement, I do not tell the jury to disregard it. [1951] Counsel has a perfect right to argue on the basis of the evidence, so long as counsel stays within the record. I don't censor counsel's argument or the cogency of his argument.

Mr. Smith: Your Honor, in view of the fact that on summation plaintiff's counsel stated that defendant had promised the jury that they would see Zell on the stand, and that they have not seen Zell, I request Your Honor to give the instruction to the effect that the jury may not draw any inference against defendant from the fact that Mr. Zell did not testify at the trial. And I will explain why we feel that is justified. Zell throughout the case has been under subpoena by the plaintiffs. They didn't see fit to put him on. Moreover——

The Court: I can't hear argument at this stage of the case. I will make my ruling, however. I deny this——

Mr. Smith: I have another important fact, Your Honor.

The Court: —on the ground that he was available to either side, and either side could have subpoenaed him.

Mr. Smith: But Zell has been in the hospital since June 13th, and I would like to file an affidavit showing that.

The Court: Well, his deposition could have been taken.

[1952] Mr. Smith: That shows he was in the hospital up to a certain point.

Mr. Leahy: Why don't you tell the Judge he was out here in the corridor for three days?

Mr. Smith: That's all right; he was here pursuant to your subpoena.

Mr. Leahy: No, he wasn't; I had excused him.

Mr. Barker: Let's not get into an argument; the jury can hear what is being said.

The Court: I am going to have only one counsel for each side speak at a time. I don't mean to be rude to you, Mr. Shapiro, but we have to move along here. Remember the jury is waiting to go out.

Mr. Smith: I think it is quite pertinent, Your Honor, on the question of the issue of good faith, that the defendants should not be prejudiced by a comment to the jury by plaintiff's counsel indicating that we should have called Zell.

The Court: You have made your request and I have made my ruling. I can't hear argument at this stage. You may file this.

Mr. Smith: We object to Your Honor's charge with respect to the subject of good faith.

The Court: Very well. Is that all? You have been at this 15 minutes; let's move along, Mr. Smith.

[1953] Mr. Smith: Your Honor, I believe that in

view of the fact that Your Honor has apprised the jury of the amount claimed by the plaintiff, you ought to apprise the jury of the result of this Defendant's Exhibit 81 (d).

The Court: No. I have given the contention of both sides, I think. I thought I gave defendant's contention greater attention than the plaintiff, on this point.

(In open court:)

The Court: Ladies and gentlemen of the jury, you may now retire, that is the 12 regular jurors. Upon reaching the jury room you will first select a foreman from amongst yourselves, who will preside over your deliberations and speak for you in returning your verdict, and then you will proceed to deliberate and reach a verdict. The 12 regular jurors may follow the marshal. The two alternate jurors will please remain a moment.

(Thereupon at 3:30 o'clock p.m., the jury retired to consider of their verdict.)

* * *

[1954] (Thereupon at 5:40 o'clock p.m. the jury returned to the court room.)

The Court: Who is the foreman of the jury? Will the foreman please rise? Mr. Foreman, the Court has received your note reading as follows:

"Platfoot's letter of September, 1951, and the contract offered in April".

[1955] The Clerk, on the Court's instructions, has picked out these papers. There are two April contracts. There is also the Platfoot letter. They are all available to you. I do want to inquire this: It is getting pretty near dinner time, and some of you may be getting hungry. Without disclosing how you are progressing, are you likely to reach a verdict in the immediate future?

The Foreman: No, sir.

The Court: Under those circumstances, unless the majority would prefer to be sent out to dinner and come back and continue working on the case, I am inclined to release you for the night and let you go home. Some of you may have home commitments or evening commitments that you might like to keep. Then come back and deliberate tomorrow morning. If there are any of you who would rather be sent out to dinner and resume your work tonight, will you raise your hands?

(No response by the jury.)

The Court: I presume all of you would rather be released at this time and resume your labors in the morning. Then I am going to excuse you at this time and you will come back tomorrow and be back in the jury room at 10 o'clock. [1956] From the moment you leave the jury box until you resume your deliberations in your jury room at 10 o'clock tomorrow morning, please do not discuss this case with anyone, and don't discuss it amongst yourselves any more until tomorrow morning at 10 o'clock. And of course don't discuss it at home with members of your family or anyone else. Don't let anyone talk to you about it. If anyone should, which I hope will not happen, you will please inform the Court tomorrow. These papers that you requested will be handed you by the Clerk tomorrow morning at 10 o'clock when you resume your deliberations. You may be excused at this time and please be back in the jury room tomorrow at 10 o'clock in the morning.

(Thereupon, at 5:45 o'clock p.m., an adjournment was taken until tomorrow, Tuesday, June 21, 1955, at 10 o'clock a.m.)

Verdict

[1958] (The jury resumed its deliberations at 10 o'clock a.m.)

(At 11:30 o'clock a.m., the jury returned into the box and the following proceedings were had in open court:)

The Deputy Clerk: Mr. Foreman, has the jury agreed upon a verdict?

The Foreman: We have.

The Deputy Clerk: Do you find for the plaintiff or for the defendant?

The Foreman: Plaintiff.

The Deputy Clerk: In what amount?

The Foreman: $190,000.

The Deputy Clerk: $190,000?

The Foreman: Yes.

The Deputy Clerk: Members of the jury, your foreman says that you find for the plaintiff in the sum of $190,000, and that is your verdict, so say you each and all?

(The jury indicated in the affirmative.)

The Court: Now at this time the Court will take the directed verdict in favor of the defendant Howell, and also in favor of all of the defendants as against the plaintiff Richard C. Webster. You may take the directed verdict.

The Deputy Clerk: Members of the jury, your [1959] verdict in this case by direction of the Court is that you find in favor of the defendant Samuel Howell as against Webster Motor Car Company, and that you find in favor of all the defendants as against Richard C. Webster, and that is your verdict so say you each and all?

(The jury indicated in the affirmative.)

The Court: Ladies and gentlemen of the jury, this has been a long trial——

Mr. Barker: Your Honor, may we interrupt to ask that the jury be polled?

The Court: I beg your pardon?

Mr. Barker: May we interrupt to ask on behalf of the defendants that the jury be polled?

The Court: You should have asked that before I——

Mr. Barker: I would like to have, but you proceeded on. I didn't care to interrupt the Court.

The Court: I think you should have asked that before I took the directed verdicts. However, you may poll the jury.

* * *

[1961] The Deputy Clerk: The jury has been polled.

* * *

The Court: * * * Now the Court will direct the Clerk to enter a judgment for triple the amount, three times the amount found [1962] by the jury, because the law provides for triple damages. It also provides for attorney fees, but the Court will not assess that except upon a proper showing which can be made by affidavit.

* * *

[1977] The Court: Mr. Leahy, you may proceed.

Mr. Leahy: If Your Honor please, I have very little to add to what was said yesterday, save and except this: That after the close of the session yesterday we called the firm which had the Cranberry case in 119 Federal Supplement 242, and Colonel Hughes talked with Mr. James St. Clair, the attorney in the office of counsel for plaintiff, and he said that in that particular case when the hearing was

had upon the quantum of fee, that he merely filed his statement of services, which was not under oath, and that there was no question with respect to the amount of time which was spent upon the case, because as to that there was no attack made upon the statement, by defendant, but they simply contended of course that the job was not worth what plaintiff's counsel thought that it was worth; and there was no appeal in the case, and it was settled, as he said, and moot. I have also filed for the Court's information an affidavit which I swore to personally because of the criticism which was made that no affidavit had been filed although one had been thus suggested by Your Honor—we do not have a copy of the record—in which I set forth the [1978] fact that I have never kept a complete diary of any work because I never felt that the matter of Court fixing the quantum of an attorney's fee was to be measured by the rules of the market place. And I don't know how a counsel can keep an accurate account of the time spent on a case. I believe most all lawyers feel as I do, that we eat it, drink it, sleep it, and ride with it, and we can't shake it off, no matter how we try to, until it is over with. And so far as the work done, I cannot see anything in counsel's argument that the matter was before him as one more or less of surprise and that he hadn't sufficient time in which to prepare a response at some formalized hearing, which I have never heard of in instances of this kind, because everything that happened in this case has been done under the notice of counsel on both sides. Both of us know the terrific amount of work that was put in by both sides in this case, and there isn't anything that was done that hasn't been done with the full knowledge of counsel on both sides. And I will say, and glad to say, that I know that counsel for the defendant in this case have worked industriously

and laboriously and much longer probably than any diary or work sheet would show they had worked. And it is a matter in Your Honor's sound [1979] discretion, and we will accept anything that Your Honor says is proper.

* * *

Opinion on Application for Attorneys' Fee

[2000] The Court: The fixing of attorneys' fees is always a delicate task. It is not fair to anyone to attempt to fix them on an hourly or a daily basis. The matters that have to be considered are the magnitude and the complexity of the issues involved, the standing of [2001] counsel at the bar—and in this case plaintiffs are represented by a leader of the bar, as well as I might say in passing, although it may be irrelevant, the defendant is represented by very able counsel—the skill exercised, the result achieved. All these imponderables and intangibles must be considered in fixing fees, rather than the time involved. It is just as a surgeon who performs a delicate and dangerous operation does not fix his fee on the basis of the number of minutes that the operation took, but rather on the whole situation. There is one element in this case that makes the task of the Court a little easier than it otherwise would be. Although there are some expressions to the contrary, it is the view of this Court that in such a case as this, it is not the function of the Court to fix the fee that counsel should charge his client, and then assess that against the defendant. My conception is that it is the duty of the Court to determine what contribution shall be made by the defendant toward the fees of plaintiffs' counsel. I say that lest there be any misunderstanding. It is not my intention to determine or express an opinion or even an intimation how much plaintiffs' counsel should charge his client. I might say in passing that

in my opinion the amount that the plaintiffs' counsel is entitled to charge his client is much larger than the amount I intend to award [2002] as the amount to be paid by the defendant. The Court is not unmindful of the fact, too, that the triple damage provision, although it has a salutory purpose, as a matter of public policy, sometimes weighs heavily on defendants, and is in itself a severe and burdensome penalty. The Court has read the cases which the plaintiffs cite in their memorandum, and has endeavored to analyze them. In the case of Cape Cod Food Products v. National Cranberry Association, 119 Fed. Supp. 242, the single damages awarded by the jury were $175,000. The attorneys' fees allowed by the eminent Jurist who presided at the trial of that case amounted to $35,000. If this Court's calculation is correct, that was 20 per cent of the single damages. In 20th Century-Fox Film Corporation v. Brookside Theatre Corporation, 194 Fed. (2d) 846, at 848 and 9, the single damages awarded by the jury were $375,000. The District Court had allowed a counsel fee of $150,000. The Court of Appeals for the Eighth Circuit in an opinion written by Chief Judge Gardner reduced that amount to $100,000. This Court has calculated that to be 26.6, aproximately, per cent of the single damages. In Milwaukee Town Corporation v. Loew's, Inc., 190 Fed. (2d) 561, decided by the Court of Appeals for the Seventh Circuit, the single damages awarded by the District Court [2003] were approximately $432,000, and the counsel fee was $225,000. The Court of Appeals reduced the single damages to approximately $313,000, and the counsel fees to $75,000, which this Court calculates to have been 24 percent. The case cited by defense counsel, Paramount Film Distributing Corporation v. Applebaum, 217 Fed. (2d) 101, at page 103, was decided by the Court of Appeals for

the Fifth Circuit, and involved treble damages of $450,000, which means $150,000 single damages. The attorneys' fees allowed were $40,000. Using these cases as more or less of a yardstick, the Court is going to award a counsel fee of $45,000, which would be about between 23 and 24 percent of the single damages. That is within the framework of the cases as relied upon by counsel. The Court will allow an attorneys' fee of $45,000. The Court repeats that that is not to be taken as an intimation of what the plaintiffs' counsel should charge his client, but merely a direction that that should be the contribution which the defendants should make to the counsel fees.

* * *

VOL.

III

No. [redacted]

JOINT APPENDIX

JOHN T. FEY, Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1956

No. 13,152

PACKARD MOTOR CAR COMPANY, ET AL.,
Appellants,

v.

THE WEBSTER MOTOR CAR COMPANY,
Appellee.

No. 13,153

THE WEBSTER MOTOR CAR COMPANY,
Appellant,

v.

PACKARD MOTOR CAR COMPANY, ET AL.,
Appellees.

Appeals from the United States District Court
for the District of Columbia

Volume III

(Pages 965 to 1180)

INDEX

	PAGE
Complaint	1
Answer	30
Plaintiffs' Interrogatories	53
Answers to Interrogatories	64
Stipulation of Facts	76
Plaintiff's Motion for a Directed Verdict	80
Plaintiff's Requested Instructions	81
Defendants' Requested Instructions	86
Statement of Counsel as to Services Rendered	94
Opposition to Application for Attorneys' Fee	112
Affidavit in Support of Application for Attorneys' Fee	116
Verdict and Judgment	118
Order Allowing Attorneys' Fee	119
Motion for Judgment Notwithstanding the Verdict Under Rule 50(b)	119
Motion for New Trial	122
Affidavit in Support of Defendants' Motion for a New Trial	128
Opinion Denying Motions	136
Order Overruling Motion for New Trial	149
Notice of Appeal (Packard)	149
Notice of Appeal (Webster)	150
Designation of Contents of Record on Appeal	151
Order for Transmission of Original Record	151

PAGE

Impaneling of Jury 154

Opening Statement on Behalf of Defendants 155

Ruling on Motion for a Directed Verdict at End of Plaintiffs' Case 466

Ruling on Defendants' Motion for a Directed Verdict at End of Whole Case 837

Opening Argument on Behalf of the Plaintiffs 847

Argument on Behalf of the Defendants 881

Argument in Rebuttal on Behalf of the Plaintiffs ... 923

Charge to the Jury 936

Verdict 959

Opinion on Application for Attorneys' Fee 962

PLAINTIFF'S WITNESSES:

Richard C. Webster:

Direct 163

Cross 213

Deposition of Marshall G. Beck:

Direct 294

Cross 308

Redirect 311

Franklin DeBaugh, Jr.:

Direct 322

Cross 332

Redirect 334

Recross 336

John Wesley Ward:

Direct 336

PAGE

Harry L. French:
Direct 337
Cross 355
Redirect 374
Recross 377

James M. Fincham:
Direct 378
Cross 413
Redirect 427

Deposition of Samuel D. Braden:
Direct 428
Cross 447
Redirect 464

DEFENDANTS' WITNESSES:

Clare E. Briggs:
Direct 472
Cross 494
Redirect 556

Roy Abernethy:
Direct 557
Cross 580
Redirect 625

Donald Dent Webster:
Direct 628

Thomas V. Maloney:
Direct 668

Robert W. Russell:
Direct 671
Cross 675
Redirect 684
Recross 685

PAGE

Francis L. Armstrong:
Direct 686
Cross 706
Redirect 759

J. Howard Ertsgaard:
Direct 761
Cross 767
Redirect 773
Recross 774

John H. Verkouteren:
Direct 777
Cross 804

Walter F. Miller:
Direct 808
Cross 825
Redirect 831
Recross 831
Re-Redirect 832

PLAINTIFF'S EXHIBITS:

Plaintiff's Exhibit 6—Dealer's Sales Agreement (Webster) 965

Plaintiff's Exhibit 9—Letter 2/14/52 Beck to Webster 968

Plaintiff's Exhibit 10—Letter 2/20/52 Webster to Beck 969

Plaintiff's Exhibit 11—Letter 3/9/52 Webster to Beck 972

Plaintiff's Exhibit 18—Letter 6/4/52 Beck to Webster 976

Plaintiff's Exhibit 20—Letter 6/11/52 Leahy to Beck 977

PAGE

Plaintiff's Exhibit 21—Letter 6/11/52 Beck to Leahy 979

Plaintiff's Exhibit 22—1952-53 Amendment to Dealer's Sales Agreement 980

Plaintiff's Exhibit 23—Lease between Somerset and Webster 986

Plaintiff's Exhibit 25—Letter 7/29/53 Leahy to Barker 989

Plaintiff's Exhibit 27—Letter 3/10/52 French to Packard 991

Plaintiff's Exhibit 29—Letter 1/2/52 Beck to McGill 992

Plaintiff's Exhibit 29a—Mutual Cancellation Agreement (Schulte) 993

Plaintiff's Exhibit 30—Letter 7/19/51 Zell to Beck .. 994

Plaintiff's Exhibit 31—Dealer Contact Report. 9/20/51 995

Plaintiff's Exhibit 32—Letter 1/11/52 Zell to Beck. 996

Plaintiff's Exhibit 33—Letter 2/13/52 Zell to Briggs 997

Plaintiff's Exhibit 35—Dealer Contact Report 3/18/52 998

Plaintiff's Exhibit 36—Dealer Contact Report 3/20/52 998

Plaintiff's Exhibit 37—Letter 3/21/52 Zell to Fenn. 999

Plaintiff's Exhibit 38—Letter 3/26/52 Beck to McGill 1001

Plaintiff's Exhibit 40—Letter 4/15/52 Leahy to Beck 1002

Plaintiff's Exhibit 41—Letter 5/14/52 Zell to Briggs 1003

PAGE

Plaintiff's Exhibit 42—Memorandum 6/10/52 Armstrong to Briggs 1004

Plaintiff's Exhibit 43—Memorandum 7/8/52 Tierney to All Departments 1005

Plaintiff's Exhibit 44—Dealer Contact Report 9/27/51 1006

Plaintiff's Exhibit 46—Receipt 5/20/52 1007

Plaintiff's Exhibit 47—Letter 6/18/52 Beck to McGill 1007

Plaintiff's Exhibit 48—Letter 3/3/52 Beck to Abernethy 1009

Plaintiff's Exhibit 49—Letter 6/16/49 Braden to Zell 1011

Plaintiff's Exhibit 54—Dealer Contact Report 10/2/52 1012

Plaintiff's Exhibit 55—Letter 9/22/52 Proctor to Beck 1013

Plaintiff's Exhibit 57—Letter 9/23/52 Beck to Proctor 1014

Plaintiff's Exhibit 58—Memorandum 9/24/52 Porter to Beck 1015

Plaintiff's Exhibit 64—Dealer Contact Report 4/18/52 1016

Plaintiff's Exhibit 65—Dealer Contact Report 4/22/52 1016

Plaintiff's Exhibit 68

Schedule I 1017

Schedule I-A 1018

Plaintiff's Exhibit 69

Schedule II 1019

Schedule III 1020

PAGE

Plaintiff's Exhibit 70
Schedule IV 1021
Schedule V 1022
Plaintiff's Exhibit 71
Schedule VI 1023
Schedule VII 1024
Plaintiff's Exhibit 72—Summary of Losses 1025
Plaintiff's Exhibit 80—Advertisements 1026
Plaintiff's Exhibit 84—Telegram, Beck to McNalley .. 1030
Plaintiff's Exhibit 86—Dealer Contact Report 6/11/52 1030
Plaintiff's Exhibit 88—Dealer Contact Report 6/9/52 1031
Plaintiff's Exhibit 90—Letter 6/2/52 Beck to McGill . 1032
Plaintiff's Exhibit 91—Letter 5/27/52 Beck to Abernethy 1033
Plaintiff's Exhibit 92—Packard Organization Chart .. 1038
Plaintiff's Exhibit 93—Letter 5/7/52 Beck to Abernethy 1039
Plaintiff's Exhibit 94—Dealer Standing Report 1041
Plaintiff's Exhibit 95—Letter 4/23/52 Beck to Abernethy 1042
Plaintiff's Exhibit 96—Dealer Contact Report 4/21/52 1043
Plaintiff's Exhibit 98—Memorandum 4/18/52 Fenn to Briggs 1044
Plaintiff's Exhibit 99—Dealer Contact Report 4/18/52 1045
Plaintiff's Exhibit 100—Letter 4/7/52 Beck to Abernethy 1045

PAGE

Plaintiff's Exhibit 105—Letter 3/31/52 Beck to Abernethy 1047

Plaintiff's Exhibit 106—Dealer Contact Report 3/28/52 1048

Plaintiff's Exhibit 107—Dealer Contact Report 3/27/52 1049

Plaintiff's Exhibit 109—Letter 3/4/52 Beck to DeBaugh 1050

Plaintiff's Exhibit 110—Memorandum 3/1/52 Armstrong to Abernethy 1051

Plaintiff's Exhibit 113—Letter 3/15/51 Osband to Dealers 1052

Plaintiff's Exhibit 122 for Identification—Letter 8/31/38 Webster & Machen to Zell 1053

Plaintiff's Exhibit 124—Advertisements 1055

Plaintiff's Exhibit 128—Letter 2/11/52 Porter to Zell. 1056

Plaintiff's Exhibit 129—Miscellaneous Correspondence 1058

Plaintiff's Exhibit 131—Summary of Losses (discounted) 1067

DEFENDANTS' EXHIBITS:

Defendants' Exhibit 1—Letter 3/4/50 Webster to Braden 1068

Defendants' Exhibit 2—Questionnaire 11/30/49 1071

Defendants' Exhibit 10—Letter 4/9/52 French to Packard 1072

Defendants' Exhibit 15—Letter 6/13/51 Platfoot to Briggs 1073

Defendants' Exhibit 16—Letter 1/2/52 Marnocha to Schroeder 1075

PAGE

Defendants' Exhibit 16A—Chart 155 9/3/51 1078

Defendants' Exhibit 17—Memorandum 9/24/51 Platfoot to Briggs 1080

Defendants' Exhibit 20—Letter 12/14/51 Schulte to Beck 1085

Defendants' Exhibit 22—Letter 2/26/54 Webster to Abernethy 1086

Defendants' Exhibit 24—Memorandum 3/1/52 (Donald D. Webster) 1088

Defendants' Exhibit 25B—Consent Order in Maryland Action 1090

Defendants' Exhibit 25C—Motion to Vacate Consent Order in Maryland Action 1092

Defendants' Exhibit 25D—Order Denying Motion to Vacate in Maryland Action 1094

Defendants' Exhibit 25E—Pre-Trial Transcript 1095

Defendants' Exhibit 25F—Transcript on Motion in Maryland Action 1098

Defendants' Exhibit 26—Tabulation of Packard's Price-Class Performance 1131

Defendants' Exhibit 30—Letter 3/9/50 Scott to Packard 1132

Defendants' Exhibit 31—Dealer Contact Reports 7/21/50 and 4/20,21/50 1133

Defendants' Exhibit 37—Dealer's Sales Agreement (Zell) 1136

Defendants' Exhibit 39—Sales Activity Reports (Webster) 1141

Defendants' Exhibit 41—Retail Quota Notice (Webster) 1142

PAGE

Defendants' Exhibit 42—Advertisements 1143

Defendants' Exhibit 44—Letter 5/29/52 Crane to Dunphy 1145

Defendants' Exhibit 45—Letter 5/29/52 Crane to French 1146

Defendants' Exhibit 48—Memorandum 12/27/51 (Beck) 1147

Defendants' Exhibit 49—Dealer Sales Agreement Termination Notice (Schulte) 1148

Defendants' Exhibit 50—Letter 1/3/52 Howell to Ulaga 1149

Defendants' Exhibit 51—Memorandum 3/26/52 (Beck) 1150

Defendants' Exhibit 55—Dealer Sales Agreement Termination Notice (DeBaugh) 1151

Defendants' Exhibit 56—Memorandum 6/17/52 (Beck) 1152

Defendants' Exhibit 59—Dealer Sales Agreement Termination Notice (Webster) 1153

Defendants' Exhibit 60—Letter 6/18/52 Howell to Ulaga 1154

Defendants' Exhibit 62A—Data Respecting Eastern Dealers—1950 1156

Defendants' Exhibit 62B—Data Respecting Eastern Dealers—1951 1157

Defendants' Exhibit 62C—Data Respecting Eastern Dealers—1952 1158

Defendants' Exhibit 62D—Data Respecting Eastern Dealers—1953 1159

Defendants' Exhibit 62E—Data Respecting Eastern Dealers—1954 1160

PAGE

Defendants' Exhibit 78 for Identification—Schedule Showing Tax Benefit to Webster (Leasehold Write-off and Nash Loss) 1161

Defendants' Exhibit 79 for Identification—Schedule Showing Tax Benefit to Webster (Nash Loss) 1162

Defendants' Exhibit 80 for Identification—Schedule Showing Tax Benefit to Webster (Leasehold Write-off) 1163

Defendants' Exhibit 81A—Washington Zone Warehouse Stock 1951-53 1164

Defendants' Exhibit 81B—New Packard Sales 1950 and 1951 (DeBaugh) 1165

Defendants' Exhibit 81C—Tabulation of Sales by Packard Dealers other than Zell and Webster to Baltimore Residents, June 1952 through 1953 1166

Defendants' Exhibit 81D—Average Annual Automotive Profits (Webster) 1174

Defendants' Exhibit 81E—Schedule of Zell Advertising 1175

Defendants' Exhibit 81F—Schedule of Zell and Webster Net Working Capital 1951 1176

Defendants' Exhibit 81G—Tabulation of Used Cars Taken in Trade 1950-53 (Zell) 1177

Defendants' Exhibit 81H—Tabulation of Used Cars Taken in Trade 1950 and 1951 (Webster) 1178

Defendants' Exhibit 81I—Schedule of Average Trading Losses and Variable Gross Profit (Webster) 1179

Defendants' Exhibit 81J—Schedule of Average Trading Losses and Variable Gross Profit (Zell) 1180

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1956

No. 13,152

PACKARD MOTOR CAR COMPANY, ET AL.,
Appellants,

v.

THE WEBSTER MOTOR CAR COMPANY,
Appellee.

No. 13,153

THE WEBSTER MOTOR CAR COMPANY,
Appellant,

v.

PACKARD MOTOR CAR COMPANY, ET AL.,
Appellees.

Appeals from the United States District Court
for the District of Columbia

Plaintiff's Exhibit 6

[WEBSTER'S 1949-1950 AGREEMENT]

PACKARD DEALER'S SALES AGREEMENT

* * *

METROPOLITAN DEALER

12. Joint exclusive selling rights (subject to provisions of paragraph 20 hereof) with other Packard Dealers and any Zone Office retail department situated within the area designated by the Zone office as the Baltimore Metropolitan Area and which is described as Baltimore City, and Baltimore County, south of the 39° 30′ meridian line, and non-exclusive selling rights within the area known as Washington Zone, and Non-exclusive selling rights within the Continental United States of America, except within the limits of other cities, towns or areas assigned exclusively to other Packard Dealers.

* * *

DEALER'S ZONE OF INFLUENCE

14. Dealer's Zone of Influence, as covered in "Definitions of Terms Used" herein, is designated as follows:

Names of Complete Counties Included in the Dealer's Zone of Influence.	Names of All Post Office Communities and Their Counties Where Only Part of a County is in the Dealer's Zone of Influence.
Baltimore City	
Baltimore County	

Zone Office may alter the foregoing designation at any time by written notice to Dealer, with the exception of any area in which Dealer is granted exclusive selling rights, and such notice shall become an amendment to this Agreement paragraph and shall be effective on and after the effective date established by Zone Office in said notice.

Plaintiff's Exhibit 6

DEALER'S DELIVERY QUOTA

15. Dealer's Delivery Quota, as covered in "Definitions of Terms Used" herein, is 200. Zone Office may alter this Dealer's delivery quota at any time by written notice to Dealer, and such notice shall become an amendment to this Agreement paragraph from date of mailing thereof by Zone Office.

* * *

BUILDING (EXISTING LOCATION)

49. Building located at (give address, number of front feet on street or streets and depth where building has front on only one street; describe location generally and with reference to competitive Dealers). 4410 York Road. Front of building 230', depth 40'. Buick is 2 miles away. Chrysler ¾ mile; Cadillac and Oldsmobile 1 mile. Centrally located to residential area and business district.

* * *

NET WORKING CAPITAL REQUIREMENT

69. Dealer will maintain net working capital (fill in A or B below)

A. Exclusively for the sale and service of Packard products

B. Only for the sale and service of Packard products and (name and description of other business) None

in accordance with formula for computation as recommended from time to time by Manufacturer. At the time of execution of this Agreement, Manufacturer's present formula provides specification of Dealer's working capital requirement as follows:

Plaintiff's Exhibit 6

(a) Minimum and base amount		$ 6,000.00
(b) (Plus)	200 (Dealer's Delivery Quota) × $150.00 =	30,000.00
(c) Dealer's present Requirement for net working capital		$36,000.00

* * *

TRANSACTIONS AFTER TERMINATION NOT A RENEWAL

125. After the termination of this Agreement, the acceptance of orders from Dealer by Zone Office, or the continuance of the sale of Packard products by Dealer, or the referring of inquiries to Dealer by Zone Office, or any other act of Zone Office, however effected, shall not be construed as a renewal of this Agreement, or as a waiver of the termination, but all such transactions shall be governed by terms identical with the terms of this Agreement.

* * *

DESCRIPTION OF DEALER'S ZONE OF INFLUENCE

From the Digest Sheet, Packard Dealer's Sales Agreement, date approved June 2, 1949

Dealer's Firm Name THE WEBSTER MOTOR CAR COMPANY Code Number 802

City BALTIMORE State MARYLAND Zone WASHINGTON

Names of complete Counties included in the Dealer's zone of influence	Names of all post office communities and their counties where only part of a County is in the Dealer's zone of influence
Metropolitan Area of Baltimore which includes: Baltimore County City of Baltimore Howard County	Montgomery County Alta Vesta Norbeck

* * *

Plaintiff's Exhibit 9

1951-1952
AMENDMENT TO PACKARD DEALER'S SALES AGREEMENT

* * *

4. Paragraph 10 shall read: "'Dealer's Delivery Quota' is the number of units which the Zone Office estimates to be the reasonable annual total sales potential of Packard Cars by Dealer. This quota is not an order by Dealer, nor an agreement to sell by Zone Office, but is established for the purpose of determining working capital and facilities required by Dealer in performance of this Agreement. It is specifically agreed that Zone Office will not be obligated to accept orders for Packard Cars from Dealer or to allocate or furnish Packard Cars to Dealer in any specified number regardless of Dealer's Delivery Quota or any other consideration."

* * *

Plaintiff's Exhibit 9

[Letterhead of Packard Motor Car Company, Washington Zone Office]

"PERSONAL & CONFIDENTIAL"

February 14, 1952

Mr. Richard C. Webster
Somerset Seafood Company
Deal Island, Maryland

Dear Dick:

This will confirm the conference held yesterday with you, Mr. Porter, and the writer in Salisbury, Md.

It was the consensus of opinion that because of the existing circumstances in your Packard Dealership in Balti-

more, Md., that your best interests could be served by the liquidation of this dealership, thereby terminating your Packard Franchise. We want you to know, Dick, that Mr. Porter and myself will do everything possible in assisting you to carry out this program.

It was mutually agreed that you would begin now to effect such termination so that it would be completed at the earliest possible time.

In order that we will be able to chart our future in Baltimore, we would like to set July 1, 1952, as the deadline or the latest date for the termination of your Packard Dealer's Sales Agreement.

With very kindest personal regards, I am

Very truly yours,

M. G. Beck
Zone Manager

Plaintiff's Exhibit 10

Received
Feb 25 1952
Packard Motor Car Co.
Washington, D. C. Zone Office

Deal Island, Md.
February 20, 1952.

Mr. Marshall G. Beck, Zone Mgr.,
Packard Motor Car Company
Washington 7, D. C.

Dear Marshall: Your letter of February 14, 1952 arrived late Monday afternoon. Because of certain matters which you there discussed, I thought I should reply promptly lest there be any misunderstanding as to whether I would be willing to liquidate the Webster Motor Car Company,

and if so, under what circumstances. I did not agree, as your letter intimates to undertake such liquidation.

*[As you know, Marshall, I have been a devoted Packard representative for more than a quarter of a century. Before I was granted a Packard Dealership, I had endeavored to prove myself worthy of that honor by leading the world as a Packard Salesman for ten consecutive years. For about fifteen years now, the Webster Motor Car Company has been a Packard Dealership. It has weathered not only a war and a serious fire but also the years of post-war scarcity. Where many dealerships all over the country have been forced to close their doors, we have always been able to operate in a manner befitting our fine product—AND AT A PROFIT. I like to think that our continuing success is due to the friendship of the thousands of satisfied Baltimoreans to whom we have sold Packards.]

Your suggestion that at our Salisbury meeting, it was the consensus of opinion that "because of the existing circumstances" in the Webster Motor Car Company, my interests could best be served by liquidation—I am at a loss to know what the "existing circumstances" are which you mention. Since I am confident that it can be shown that, in relation to Zell's capital investment, we have always done a better job, are there "existing circumstances" in the Zell organization necessitating any such action as you suggest to be in my best interest?

Be that as it may, Marshall, if there are any "existing circumstances" in the Webster Motor Car Company, which in your opinion cause us to fall short of the Packard Dealer Standard, please, at your earliest convenience give me a detail report of them so that I may take swift action to effect your sound suggestions. Otherwise, I will not know what it is about our dealership which you consider weak

*Matter enclosed in brackets in letter was excluded from evidence.

Plaintiff's Exhibit 10.

[As you know, we spent approximately $4,000. with the Geo. May Co for business engineering services. Whether it was money well spent is a question. But there can be no question that we have continually attempted at great expense to keep the company abreast and ahead of the standards required of a Metropolitan Dealership. You cannot have forgotten that immediately after the disastrous fire at York Road in 1949, you and Mr. Braden urged us not only to stay in business but also to buy that property and to rebuild it, all at tremendous expense. If I tell you that this advice was the sole factor that persuaded me to remain a Packard Dealer and to invest well over another hundred thousand dollars, you can rest assured that it is so.]

As to whether or not I would be willing to liquidate or to sell my interest in the Webster Motor Car Company, I can only say that, depending on price, such an occurance is not beyond the realm of possibility. Naturally, because of its effect upon prospective buyers, I would not UNDER ANY CIRCUMSTANCES attempt to complete such a liquidation or sale by any prearranged date. What price I would require is too important a decision for me to make without the advice of my auditors, lawyers and tax advisors. However, it is my feeling that the purchaser would have to agree to lease the York Road property for at least ten years at no less than $750.00 per month, apart from paying dollar for dollar for inventory fixtures, machinery, etc. My first impression is that since I could assist the purchaser in Packard Sales policy, a yearly salary of at least 15,000 for no less than ten years would be the type of agreement I should make.

---

*Matter enclosed in brackets in letter was excluded from evidence

For a multitude of reasons (the explanation of which lies in a lifetime of Packard Service) I do not intend to think in a negative fashion about the matters which you discussed in your letter. Rather than think in terms of liquidation or sale, it is my intention to plan and work for the improvement and advancement of the Webster Motor Car Company as a franchised Packard Dealer. With the assistance and advice of you and Mr. Porter, I feel sure that the $15,000 to $30,000 which I have earned yearly can be greatly increased while doing an even better job.

And so, Marshall, unless an unsought-for buyer appears on the scene, please be advised that it is my intentions and desire to remain a Packard Dealer indefinitely and that my primary objective is now, as it always has been, to serve well and faithfully the Packard Motor Car Company.

With very kindest personal regards, I am

Very truly yours,

Plaintiff's Exhibit 11

[Letterhead of The Webster Motor Car Company]

March 9th, 1952

Mr. Marshall Beck, Zone Mgr.,
The Packard Motor Car Company
Washington, D. C.

Dear Marshall: I had hoped and expected that you would promptly reply to my letter of Feb. 20th, 1952. However, last Saturday afternoon, when my son, Donald, told me of his telephone conversation with you that morning, I was

extremely disappointed to learn that, while not definite, it appeared that as of then you were thinking seriously of not renewing my franchise agreement on April 1st. If that is your present intention, I think that my long and faithful service to the Packard Motor Car Company is receiving little consideration from you.

Such nebulous and indefinite terms as you used in your letter of February 14, 1952 ("your best interest could be served by . . liquidation" and "because of the existing circumstances in your Packard Dealership" . .) give no explanation of what, if anything you think is so weak in the Webster Motor Car Company as to compel the liquidation which you suggested. Certainly, Marshall, I am entitled to be told of any such weakness if it exists, and given an opportunity to correct it. If more capital investment were necessary, it would be forthcoming; if personnel changes were necessary, they would be made.

But, since for all I know, you might still be intent on terminating our franchise without any cause sufficient under our agreement, and without affording us the rights which would be our if you sought to cancel "for cause", I must advise you that I intend to oppose with all my power any attempt to destroy the Webster Motor Car Company. *[As I understand it, you told Donald that after receiving my letter of February 20, 1952, you forwarded it to the factory and they, in turn, sent the Eastern District Sales Manager to Washington; he and you then visited Baltimore for a meeting with Mr. Sidney Zell. You expressed to Donald the opinion that the Zell Motor Car Company would be very fair in buying us out. Marshall I have grave doubts that Zell would be fair, because that organization is the same one, with but few changes in personnel, which has always bit-

*Matter enclosed in brackets in letter was excluded from evidence.

terly resented the fair and vigorous competition of the Webster Motor Car Company.

Since even you advised Donald that if we lost our franchise, we should not expect to be paid anything for the fact that we are now a going, profitable business; and since you feel that under such circumstances, a purchaser would pay us nothing for our Good Will, how can I expect Zell to make a fair offer? Aside from the usual business assets, there are incidental but extremely valuable assets which go with the fact that the Webster Motor Car Company is a well established and highly respected business. Excellent credit, family transportation, employment of old and treasured friends are but a few of the intangibles. Will Zell pay fairly for those? You know it won't, Marshall, and so do I.]

Therefore, I look for no aid, comfort or fairness from the Zell Motor Car Company, should you terminate my franchise. In fact, I have grave doubts that I would be willing to sell out to Zell at any price.

Frankly, Marshall, I believe the future for and *with* Packard is excellent. We now have a superior product and it is, at long last, priced to meet competition. I believe that on serious consideration, you will decide not to terminate our franchise because termination would be unfair to all of us here at the Webster Motor Car Company as well as unfair to Packard. I am confident that you will give proper weight to the fact that it was solely due to the advice and insistence of you and Mr. Braden that I stayed in business and reinvested heavily after the fire. I believe that you will give proper weight to the fact that you recently prohibited us from accepting as a second noncompeting line, the Austin Franchise.

Plaintiff's Exhibit 11

*[You are certainly not blind to the fact that the fair but vigorous competition which we continually give every new car dealer in our area is bound to result in more new Packard sales than if we are forced to close our doors. In fact, we have a six months contract with the Sun Papers for regular back page advertising. I would appreciate any suggestions of these ads because they are primarily designed to inform the public that we will meet and surpass competition. They also attempt to preserve the prestige quality of Packard at its new low price. Harry has been instructed to expand our sale force and our sales vigor. He is tomorrow ordering twenty new cars and has definite instructions to go all out for volume. We are advertisng for new car salesmen and I would appreciate any sales promotion you might suggest. I feel confidant that we can do an even better job for Packard and the Webster Motor Car Company in 1952 and the future.]

And so, Marshall, I am counting on you and your good judgment to aid and assist the Webster Motor Car Company in its efforts to continue in business as a profitable authorized franchised Packard Dealer.

Very truly yours,

THE WEBSTER MOTOR CAR COMPANY

*Matter enclosed in brackets in letter was excluded from evidence

Plaintiff's Exhibit 18

[Letterhead of Packard Motor Car Company,
Washington Zone Office]

"Registered Mail"
(Return Receipt Requested)

June 4, 1952

The Webster Motor Car Company
4410 York Road
Baltimore, Maryland

Dear Sir:

The term of the Packard Dealer's Sales Agreement between this company and your company dated June 2, 1949, as amended, expired as provided therein on March 31, 1952.

On or about April 22, 1952, there was tendered to and left with you for execution a proposed 1952-53 Amendment to Packard Dealer's Sales Agreement, the effect of which when executed by both parties would be to extend your Packard Dealer's Sales Agreement to March 31, 1953. It was requested at the time that the same be completed and returned to the Zone Office not later than April 29, 1952.

The proposed 1952-53 Amendment to Packard Dealer's Sales Agreement has never been returned to the Zone Office by you notwithstanding that on or about May 20, 1952, a promise was made on your behalf that the Zone Office would be notified of your decision within one week thereafter.

In view of your failure to return this executed form to us, we are obliged to advise you that unless same is received by the Zone Office on or before June 11, 1952

duly executed by your company, the same will not thereafter be accepted for execution by the Zone Office, and we shall without further notice to you treat as immediately operative the provision of your Sales Agreement under the heading, "Transactions After Termination of Dealer's Sales Agreement," and in such event you shall consider this letter our demand for prompt settlement of all the existing obligations between the parties and the performance of all other clauses operative in such case.

Very truly yours,

PACKARD MOTOR CAR COMPANY
(Washington Zone Office)
M. G. Beck
Zone Manager

Plaintiff's Exhibit 20

[Letterhead of William E. Leahy]

11 June 1952

Mr. Marshall Beck,
Packard Motor Company,
1242—24th Street, N. W.
Washington, D. C.

Dear Mr. Beck:

Re: Webster Motor Car Co. v. Packard, Zell, etal.

During our discussion on Monday I stated to you that in view of the events of the last two months the Webster

Company had serious misgivings as to whether Packard could be relied on to deal with it in good faith if it accepted your offer of a one-year renewal, bearing in mind that there are a thousand ways in which a big company can make things unbearable for one of its dealers or handle matters in such a way as to put one dealer at a disadvantage with another. Also I voiced Webster's fear that the renewal might be for a limited period only, and hence in the nature of a postponement of a death sentence.

You told me that there was no reason at all to fear that Packard would handle matters in Baltimore to the disadvantage of Webster or fail to deal with Webster in entire good faith. As to Webster's second fear, you stated that Packard traditionally operated under one-year contracts and that this was done purposely to allow Packard full freedom to change its policy as circumstances might require, but that short of some intervening and unpredictable event there was no reason to believe that Webster could not look forward to annual renewals in the future as it had in the past.

I am wondering whether there is not some way by which the company itself could give us formal assurances along the lines above indicated. I am moved to this suggestion partly by intimation made by company representatives at our May 20th conference to the effect that Packard conceivably might wish to have one large dealer for the entire Baltimore area as it has in other Metropolitan areas. Of course, this seemed directly applicable to the Zell situation and served to renew Webster's fears.

As we are attempting to settle differences by entering into a renewal of a contractual relationship you will, I am sure, as a good business man see the desirability of clearing

away all dead timber. The time to remove doubts and misgivings is now, before any renewal is signed. It is in this spirit that I am writing the present letter.

In the event that the assurances above-referred to are given, I am authorized to advise you that the Webster Motor Car Company will sign a renewal contract.

Sincerely yours,

WILLIAM E. LEAHY

Plaintiff's Exhibit 21

COPY

Wm. E. Leahy

Regarding your letter of June 11, 1952, the entire terms of our offer to Webster Motor Car Company are contained in our letter to that company dated June 4, 1952. No commitment has been nor will be made with reference to any alleged understanding not contained in the proposed written amendment referred to in our letter of June 4, 1952.

/s/ Marshall G. Beck

Delivered by hand 5:30 P. M. June 11, '52

Leahy letter by hand 1:00 P. M. June 11, 1952

[Plaintiff's Exhibit 102 is on the same printed form as Plaintiff's Exhibit 22, except that the printed termination date in paragraph 2 was stricken out and the date July 1, 1952 substituted thereto.]

1952-1953
AMENDMENT TO PACKARD DEALER'S SALES AGREEMENT

WITNESSETH: WHEREAS undersigned Dealer and Zone Office entered into a Packard Dealer's Sales Agreement dated _____, 1949, hereinafter referred to as "Said Agreement," which the parties thereto now desire to amend.

NOW, THEREFORE, Said Agreement is amended as follows, and this Amendment shall be attached as a Rider to Said Agreement.

1. The provisions of any prior amendments to Said Agreement are hereby terminated except those continued in force by this amendment.

2. Term of Said Agreement is extended and date for termination without notice, as set forth in Paragraph 17, shall be March 31, 1953.

3. Paragraph 3 shall read: " 'Packard Products' include Packard Cars and bodies; also parts, accessories, materials or services, as are manufactured and/or furnished or approved by Manufacturer for sale to Zones and Dealers, as provided from time to time by Manufacturer in Trade Letters, Parts and Accessories Price Lists and Bulletins, or amendments or revisions thereof."

4. Paragraph 10 shall read: " 'Dealer's Delivery Quota' is the number of units which the Zone Office estimates to be the reasonable annual total sales potential of Packard Cars by Dealer. This quota is not an order by Dealer, nor an agreement to sell by Zone Office, but is established for the purpose of determining working capital and facilities required by Dealer in performance of this Agreement. It is specifically agreed that Zone Office will not be obligated to accept orders for Packard Cars from Dealer or to allocate or furnish Packard Cars to Dealer in any specified number regardless of Dealer's Delivery Quota or any other consideration."

5. The following sentence is added to Paragraph 13: "The sole obligation of Zone Office in granting exclusive selling rights shall be confined to its agreement under Paragraph 16 hereof."

6 The following is added to Paragraph 21: "Due to present or prospective material shortages caused by the national emergency, the Manufacturer has reserved the right under its warranty, and Zone Office accordingly reserves the right hereunder in making replacements, to use parts, accessories or equipment made of such materials and of such specifications as in Zone Office or Manufacturer's discretion shall appear proper without

regard to the composition or specifications of the items replaced, or to refrain from making any such replacement should such course appear advisable to Zone Office, or to the Manufacturer; all without liability under such warranty.

"Dealer agrees either: (a) to include in Dealer's retail order blank a provision similar to the foregoing, in the language in which it is set forth in Paragraph 3 of the Packard Owner's Service Policy; or, (b) to cause to be stamped, printed or typewritten upon each of Dealer's retail order blanks the statement 'The Warranty on the Packard automobile herein ordered is subject to reservations contained in Packard Owner's Service Policy'."

7. The following sentence is added to Paragraph 27: "Title to any products sold by Zone Office shall pass to Dealer upon 'Delivery'."

8. Paragraph 41 is eliminated entirely.

9. Paragraph 42 shall read: "Dealer is privileged to return material shipped by Zone Office in error within thirty (30) days after invoice date, for full credit, in accordance with the Zone Office invoice amount."

10. Paragraph 43 shall read: "Dealer is privileged to return material revealed by Dealer's Receiving Inspection to be defective upon receipt and before installation on a car, other than for shipping damage, within thirty (30) days after invoice date, for full credit, in accordance with the Zone Office invoice amount."

11. Paragraphs 44, 45 and 46 are eliminated entirely.

12. In Paragraph 47, wording "Paragraphs 42 to 46 inclusive" shall read: "Paragraphs 42 and 43," etc.

13. The following is added to Paragraph 56: "Dealer hereby subscribes for 'Packard Parts and Price List Maintenance Service' at cost to Dealer and on such terms of payment as are established by Manufacturer's Parts and Service Bulletins, as issued from time to time."

14. Paragraph 62 shall read: "It is Manufacturer's policy to allow the word 'Packard,' under some circumstances, to be used as a part of the firm or corporate name of Dealer, but only upon written approval of Manufacturer. Such approval may be obtained by Zone Office from Manufacturer's Sales Division—Administrative Department."

15. Paragraph 75 shall read: "Contributions by Dealer as deposited in the Pool shall be used by Manufacturer solely for local advertising in Dealer's Zone of Influence, using local media judged by Manufacturer to most benefit Dealer. Contributions by Manufacturer will be used to supplement Dealers' contributions but not necessarily in Dealer's Zone of Influence."

16. Paragraph 76 shall read: "Besides its contribution to the Pool, Manufacturer will also continue to make independent investments in national advertising media."

17. Paragraph 76 (a) is added, reading as follows: "In addition to the cooperative program to which all Dealers contribute, many Dealer points have access to television programs featuring Packard Products. Accordingly, Dealer agrees to contribute to television advertising in such amounts and on such terms as are established by Manufacturer in Trade Letters from time to time."

18. Paragraph 76 (b) is added, reading as follows: "When Dealer subscribes to any local advertising or promotion jointly financed by Dealer and Zone Office, or by Dealer and Factory, with contributions specifically provided for over and above cooperative advertising contribution or television advertising contribution, it is agreed that such contributions shall be separate and distinct from the contribution to or purposes of cooperative advertising or television advertising. An example of this type of joint advertising would be a program of spot radio announcements jointly paid for by the Dealer and the Manufacturer."

19. Paragraph 91 shall read: "If Dealer fails to keep Dealer's place of business open during the customary hours of the trade in Dealer's Zone of Influence for a period of ten (10) days or more, or discontinues Dealer's business in locality covered by this Agreement, without written approval of the Zone Office; or if Dealer establishes a place of business for sale or service of Packard Cars in any location other than those described in Paragraphs 49 to 52, inclusive, of this Agreement, without written approval in advance from Zone Office."

20. In Paragraph 114, words " . . . of the current and two preceding car models . . . " are changed to read: " . . . applicable to car models produced by Manufacturer in the current and two preceding calendar years . . . "

21. Paragraph 112A is added reading: "Purchases by Zone Office from Dealer under Paragraphs 114 and 116 hereof shall be subject to a Zone Office Handling Charge of 15% of the purchase price determined in accordance with provisions of said paragraphs."

22. Paragraph 115 is eliminated.

23. Paragraph 134 shall read: "In order to coordinate the policies of the Manufacturer with those of Dealer, Dealer agrees that Dealer will submit to Zone Office in advance of publication any locally prepared copy of any proposed newspaper, magazine, trade bulletin, radio, television, or other advertising, along with a statement of the media to be used and the space or time location in such media, and agrees not to publish, broadcast, or post any advertising to which Zone Office takes exception as to copy, content, medium, or time

or location within the medium; and Dealer further agrees that Dealer will remove, amend or modify any poster, sign or other advertising within or upon the interior or exterior of Dealer's place of business, or elsewhere, to which Zone Office takes exception."

24. In Paragraph 25, fourth line, words "refusal for any reason to accept" shall be changed to read "refusal or failure to accept."

25. Paragraph 36 is eliminated entirely since Trade Letter Net Prices reflect allowances immediately on effective date thereof.

26. In Paragraph 68, the following words are eliminated: " . . . Zone Office agrees to supervise installation for Dealer of a uniform accounting system, recommended by Manufacturer, without cost to Dealer, except for forms and materials used and Dealer's bookkeeping or accounting expense. In return for this service . . . "

27. The following sentence is added to Paragraph 68: "Zone Office may use Dealer financial statements for purpose of discussion with any bank or financing agency specified by Dealer in connection with payments for Packard Cars to be purchased by Dealer."

28. Paragraph 84 shall read: "Insolvency of Dealer or any member of Dealer (if Dealer is a copartnership) or failure or inability of Dealer to pay for Packard Cars as provided in Paragraph 30 hereof."

29. Paragraph 97 shall read: "Termination of Packard Dealer's Sales Agreement, or of Gold Seal Designation, for reasons other than those specifically covered in Paragraphs 81 to 93, of this Agreement, and except termination of Agreement pursuant to Paragraph 17 (which is automatic and requires no notice), or pursuant to Paragraph 52 hereof, must be submitted to a Packard Dealer Equities Board, if requested by Dealer."

30. The following sentence is added to Paragraph 113: "Dealer net billing cost includes only net price of car and accessories, and E.O.H. It does not include items such as cooperative advertising contribution, Zone charge for preparation for delivery, or gasoline."

31. Paragraph 137 is added and shall read: "It is understood that Zone Office may, for all purposes hereunder, continue to consider the principal owners and management of Dealer to be at all times as stated on Page 1 of this Agreement, unless and until written notice of any change thereof is received by Zone Office from Dealer, and thereafter may continue to consider any such change therein to remain in effect until further written notice of change is received; and any written notice or other document signed by any one of the partners (where Dealer is a Copartnership), or by any officer of Dealer (where the latter is a Corporation) shall be conclusively deemed to have been authorized by Dealer.

32. Paragraphs of Said Agreement requiring filling-in of blank spaces for Dealer's individual circumstances are hereby restated (with amendments thereto if any) so that blanks are filled in as follows (paragraph numbers correspond to those of Said Agreement):

(Dealer Name) THE WEBSTER MOTOR CAR COMPANY

a Maryland (State) corporation

~~xxxxxxxxxx~~

~~xxxxxxxxxx~~

~~xxxxxxxxxx~~ doing business as A Corporation

organized and existing under the State Laws of Maryland

of 4410 York Road (Number and Street) Baltimore (City) Maryland (State)

and having principal owners and management as follows:
(indicate manager by asterisk)

R. C. Webster	Title Chairman of the Board	% of Ownership 100
H. L. French, Jr.*	Title President	% of Ownership —
	Title	% of Ownership
	Title	% of Ownership

Metropolitan Dealer

Pgh. 12. Metropolitan Area consisting of the city of Baltimore, Baltimore County, and Howard County, and non-exclusive selling rights within the area known as the Washington Zone except those areas assigned exclusively to other Packard Dealers.

Single-Dealer City

Pgh. 13. Corporate limits of _____,

County of _____, State of _____ and

Dealer's Zone of Influence

Pgh. 14. Names of Complete Counties Included in the Dealer's Zone of Influence.

Baltimore County
Howard County

Names of All Post Office Communities and Their Counties Where Only Part of a County is in the Dealer's Zone of Influence.

Delivery Quota Pgh. 15. 291 (Two Hundred Ninety-One)

Other Business Pghs. 48, 55 and 69

Name and description of other business:

NONE

Building (Existing Location) Pgh. 49. Building located at (give address, number of front feet on street or streets and depth where building has front on only one street; describe location generally and with reference to competitive Dealers).

4410 York Road, Baltimore, Maryland - Front of building 230' - depth 40'. Buick two miles away. Chrysler 3/4 mile. Cadillac & Oldsmobile 1 mile. Centrally located to residential area and business district.

Building and Land (Existing) Areas Pgh. 50. Area of Building 9,200 (square feet), area of Showroom 630 (square feet), area of Parts and Accessories Department 312 (square feet), area of Service Department 8,258 (square feet) and 14 (No. Work Stalls), area of Customer Parking Lot 1,500 (square feet), area of Used Car Department — (sq. ft. inside) and/or 3,500 (sq. ft. lot)

Building (Existing) Construction Pgh. 51. Building described in paragraph 49 hereof is constructed as follows:

Steel frame and stone construction. Plate glass front. Roof, composition - steel supported.

Working Capital Pgh. 69. At the time of execution of this Amendment, Manufacturer's present formula provides specification of Dealer's working capital requirement as follows:

(a) Minimum and base amount $10,000.00

(b) (Plus) 175 (60% of Dealer's Delivery Quota) × $200.00 = 35,000.00

(c) Dealer's present Requirement for net working capital $45,000.00

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement, in triplicate, this _____ day of _____ 19__, and it shall not become effective before April 1, 1952.

THE WEBSTER MOTOR CAR COMPANY
Dealer (Firm Name)

By X

Title

PACKARD MOTOR CAR COMPANY
(Washington Zone Office)
Zone Office (Firm Name)

By

Title Zone Manager

Plaintiff's Exhibit 23

COPY

THIS LEASE, made this 1st day of January, 1950, between THE SOMERSET REALTY COMPANY, a corporation, Lessor, and THE WEBSTER MOTOR CAR COMPANY, a corporation, Lessee.

WITNESSETH, that the Lessor hereby rents to the Lessee the fee simple garage property known as 4410 York Road, Baltimore, Maryland for a term of ten (10) years beginning as of the first day of January, 1950, and ending on the 31st day of December, 1960, at the rental of three hundred dollars ($300) a month, payable monthly in advance.

1. THE Lessee hereby covenants to pay the rent as aforesaid, and to keep the premises in good order and repair at his own expense and surrender the peaceful and quiet possession thereof at the end of said term or any renewal thereof, in as good condition as when received, natural wear and decay of the property and unavoidable accident expected, and further the Lessee will not do, suffer or permit anything to be done in or about the premises which will contravene the policy or policies of insurance against loss by fire, and further the Lessee covenants to repair the interior of the premises herein leased at its own expense.

2. IF the rent shall be ten (10) days in arrear, the Lessor shall have the right to distrain for the same and to reenter and take possession.

3. IF the premises shall be destroyed or rendered untenantable by fire or unavoidable accident, the tenancy herein created, shall, at the option of the Lessee, be thereby

terminated and all liability for rent thereunder shall cease upon payment proportionate to the day of fire or unavoidable accident.

4. STRUCTURAL changes or additions may be made to the building and premises with the express prior written consent of the Lessor and, if such consent is given by the Lessor, such structural changes or additions shall be made at the expense of the Lessee.

5. THIS Lease shall continue in force from year to year after the expiration of the term above mentioned unless the Lessor or the Lessee gives notice in writing to the other at least sixty (60) days prior to the termination of the term above mentioned or any renewal thereof.

IN WITNESS WHEREOF, the Lessor has caused this Lease to be signed in its name by its President and its corporate seal to be hereunto affixed and duly attested by its Secretary and the Lessee has caused this Lease to be signed in its name by its President and its corporate seal to be hereunto affixed and duly attested by its Secretary the day and year first above written.

THE SOMERSET REALTY COMPANY

BY RICHARD C. WEBSTER
President
Lessor

ATTEST:

DONALD D. WEBSTER
Secretary

[SEAL]

Plaintiff's Exhibit 23

THE WEBSTER MOTOR CAR COMPANY

BY H. L. FRENCH
President
Lessee

ATTEST:

CHAS. E. THOMPSON
Secretary

[SEAL]

STATE OF MARYLAND:
CITY OF BALTIMORE: ss.

I HEREBY CERTIFY, that on this 1st day of January, 1950, before me, the subscriber, a Notary Public of the State of Maryland, in and for Baltimore City aforesaid, personally appeared Richard C. Webster, President of the Somerset Realty Company, and acknowledged the foregoing lease to be the act and deed of The Somerset Realty Company.

AS WITNESS my hand and Notarial Seal.

CHAS. E. THOMPSON
Notary Public

[SEAL]

Plaintiff's Exhibit 25

STATE OF MARYLAND:
CITY OF BALTIMORE: ss.

I HEREBY CERTIFY, that on this 1st day of January, 1950, before me, the subscriber, a Notary Public of the State of Maryland, in and for Baltimore City aforesaid, personally appeared Harry L. French, Jr., President of The Webster Motor Car Company, and acknowledged the foregoing lease to be the act and deed of The Webster Motor Car Company.

AS WITNESS my hand and Notarial Seal.

CHAS. E. THOMPSON
Notary Public

[SEAL]

Rec'd for record May 10, 1950, 2:01 p.m. & recorded in the land records Baltimore City, liber M L P 8086 page 417

M. LUTHER PITTMAN, Clerk.

Plaintiff's Exhibit 25

[Letterhead of William E. Leahy]

29 July 1953

Mr. Robert W. Barker,
744 Jackson Place, N. W.
Washington 6, D. C.

Dear Mr. Barker:

It has become necessary for the Webster Motor Car Company to liquidate its automobile business. Following what I believe was an unlawful termination of that company's Packard dealer franchise on April 1, 1952, it en-

deavored to make use of what remained of the assets it had built up over the years. In an effort to minimize the damages caused by the action complained of in the above-entitled suit, it attempted to continue in the automobile business and accepted a franchise from another manufacturer. However, after eight months of operation of the new business the continuing and serious losses which it has suffered can no longer be sustained.

In connection with the liquidation of its automobile business, the Webster Motor Car Company will have to abandon the unexpired portion of its lease and the leasehold improvements which it made in response to, and in reliance upon the request of the Packard Motor Car Company that Webster remain in business after its destructive fire in 1949. These leasehold improvements have a present unamortized book (cost) value of approximately $23,000.00. The other losses which will result from enforced liquidation are not readily predictable at this time.

In view of the fact that my clients' losses are attributable to the unjustifiable cancellation of the Webster Motor Car Company's Packard franchise and will be included in their damage claim in the above-entitled suit, this letter will serve to notify you, as attorney for certain of the defendants, that it is the Webster Motor Car Company's intention to commence liquidation within approximately two weeks. This notice is being given to you in advance of any public announcement to that effect in order that you may avail yourself of this opportunity to suggest any course which you believe will tend to minimize my clients' losses.

Yours very truly,

William E. Leahy

Plaintiff's Exhibit 27

[Letterhead of The Webster Motor Car Company]

March 10, 1952

Packard Motor Car Company
Washington Zone Office
Mr. George Wilson
Zone Car Distributor
1242 24th Street, N. W.
Washington, 7 D. C.

Dear George:

Below is listed our car orders (20) for the month of April.

2595-G AT	*7235*	2565 S AT HE FS BU	*7237*
2592 S AT HE	*7238*	2565 XD AT HE FS BU	*7239*
2592 G AT	*7240*	2562 G AT HE FS BU	*7241*
2592 S Std Trans	*7242*	2562 JO AT HE FS	*7244*
2592 J Std Trans	*7245*	2562 OJ AT HE FS BU Special order for G. Furbush	*7246*
2592 G Std Trans	*7247*		
2592 H Std Trans	*7248*	2562 U AT HE FS BU	*7249*
2592 U Std Trans	*7250*	2562 M AT HE FS BU	*7252*
2592 JO Std Trans	*7253*	2562 U AT HE FS BU	*7256*
2592 BH Std Trans	*7254*	2572 H AT HE BU	*7255*
		2572 O AT HE BU	*7257*

Very truly yours,

The Webster Motor Car Company

H. L. French.

Plaintiff's Exhibit 29

[Letterhead of Packard Motor Car Company,
Washington Zone Office]

RECEIVED
JAN 7 1952
E. G. McGILL

January 2, 1952

Mr. E. G. McGill, Manager
Organization & Analysis Dep't.
Packard Motor Car Company
Detroit 32, Michigan

Dear Ev:

I am sending you herewith an "Agreement for Mutual Cancellation" of the Packard Dealer's Sales Agreement for Schulte Motor Sales, Incorporated of Baltimore, Maryland.

We are eliminating this dealership inasmuch as it was agreed with Zell Motor Car Company that he would be able to secure Packard's rightful share of the business in Baltimore.

This transaction was handled in a manner which was satisfactory to all concerned.

Very truly yours,

M. G. Beck
Zone Manager

Attached

cc: Mr. Leo E. Fenn

Note: Paragraph 2 on original has a circle around it in pencil.

Plaintiff's Exhibit 29a

AGREEMENT FOR MUTUAL CANCELLATION
OF PACKARD DEALER'S SALES AGREEMENT

THIS AGREEMENT, dated December 14, 1951 between PACKARD MOTOR CAR COMPANY a Corporation of 1242—24th Street, N.W., Washington, D.C. hereinafter called Zone Office and SCHULTE MOTOR SALES, INCORPORATED a Corporation of 6400 Frederick Road Baltimore, Maryland hereinafter called Dealer

WITNESSETH: It is hereby mutually agreed that, except for the purpose of settling existing obligations arising thereunder, the Dealer's Sales Agreement dated May 27, 1949 between PACKARD MOTOR CAR COMPANY and SCHULTE MOTOR SALES, INCORPORATED is hereby cancelled effective as of the close of business January 11, 1952.

SCHULTE MOTOR SALES, INCORPORATED

By W. A. SCHULTE

Title President

PACKARD MOTOR CAR COMPANY
(Washington Zone Office)

By M. G. BECK

Title Zone Manager

Plaintiff's Exhibit 30

[Letterhead of Zell Motor Car Company]

July 19th, 1951

Mr. Marshall G. Beck., Zone Manager.
Packard Motor Car Company.,
1242—24th St. N.W. MGB
Washington, 7. D. C. BM

Dear Marshall :-

At your convenience will you advise me the result of your visit to Baltimore yesterday? We are very anxious to know whether or not you were successful in stopping the damaging advertising by "Packard-Schulte" in offering Official's cars, any model or color, even less than one hundred miles, at a discount of $500.00.

Before the Model change, which is approximately four months away, will you inform us about your policy with regards to the number of Dealers necessary in Baltimore from the factory's viewpoint. From our conversation yesterday, you know our definite feelings. We shall await your decision before deciding upon our plans, but we positively cannot continue much longer constantly operating in the Red.

In the interim you could explore the factory's position, if you concur with me, as I believe you do. I presume, Ernie Platfoot is the first to be consulted. Of course, if I am mistaken, and you do not agree with me, there is nothing further to be done.

I shall appreciate hearing about your thoughts in this matter.

Sincerely,

ZELL MOTOR CAR COMPANY

SIDNEY ZELL
President

Note:

Page 995 is on card 16.

Plaintiff's Exhibit 32

[Letterhead of Zell Motor Car Company]

MGB January 11, 1952

Mr. Marshall G. Beck, Zone Manager
Packard Motor Car Company
Washington Zone Office
Washington 7, D. C.

Dear Marshall:

On second thought it might be a good idea to endeavor to meet with Clare Briggs, in New York. I imagine it may prove to be rather difficult to arrange an hour or so of uninterrupted conversation, but see what you can do as it would save you another trip to Detroit.

Will look forward to learn the out-come upon your return. Hope you have a nice trip.

Sincerely,

(s) SIDNEY
Sidney S. Zell

Plaintiff's Exhibit 33

[Letterhead of Zell Motor Car Company]

RECEIVED
FEB 15 1952
C. E. BRIGGS

Mr. Spencer to note CEB

February 13, 1952

Mr. Clare E. Briggs
General Sales Manager
Packard Motor Car Company
Detroit 32, Michigan

Dear Clare:

Monday, Marshall Beck, advised me that he has received "the green light" to proceed along the lines we discussed in New York, on January twenty-ninth.

I do want to thank you and your associates, for the confidence placed in me, and to assure you, barring conditions beyond my control, your trust is not misplaced. The opportunity now given us is deeply appreciated.

We have already taken steps to augment and strengthen our organization. By April first, or before, we shall be fully prepared.

Very sincerely,

(s) SIDNEY ZELL
Sidney S. Zell
President

Plaintiff's Exhibit 35

DEALER CONTACT REPORT

DEALER'S CITY Balt. Md. ZONE Wash. DATE 3/18/52

DEALER'S NAME Zell Motor Co QUOTA

* * *

What Was Accomplished by This Contact?

Contact made with Mr. Beck and Mr. Fenn. re Webster & Towson

SIGNED C. M. PORTER

Plaintiff's Exhibit 36

DEALER CONTACT REPORT

DEALER'S CITY Balt. Md. ZONE Wash. DATE 3/20/52

DEALER'S NAME Zell Motor Co QUOTA

* * *

What Was Accomplished by This Contact?

Contacted Mr. Zell & Mr. Proctor with Mr. Howell in reference to termination of DeBaugh.

Mr. Zell agreed to co-operate with Mr. DeBaugh on a special parts discount to help him take care of his Packard owners—etc.

SIGNED C. M. PORTER

Plaintiff's Exhibit 37

[Letterhead of Zell Motor Car Company]

Received
Mar 24 1952
L. E. Fenn

March 21, 1952

4/1/52 advised
Beck by telephone to try and get
Cancellation 7/1/52 amendment
signed by Webster
Discussed with CEB
RA

Mr. Leo E. Fenn
Eastern Divisional Sales Manager
Packard Motor Car Company
Detroit, Michigan

Dear Leo:

Thank you so much for your telephone call yesterday, concerning the local situation.

I can readily understand that the best laid plans do go astray at times, but with the many years of experience, dealing in such matters, certainly Packard should be able to discover some way to reduce the necessary period of time. The recent change in plans, as expressed by you on Wednesday, leaves me in a very unenviable position, as only after being assured by Marshall Beck, that July first was the deadline did I renew our lease for the Service Station for a five year period beginning January first next.

Plaintiff's Exhibit 37

Being a dyed in the wool Packard man I am willing to wait till March 31st. 1953, if that is honestly the best arrangement that can be made. To be realistic, it appears to me that I should have some concrete evidence of good faith from Packard. As matters now stand, the verbal agreements evidently will not materialize and this time I feel as though I should be assured in writing.

I am confident your Legal Department, will frown on this suggestion. I have confidence in Packard and have exhibited it where it really hurts—my pocketbook, so all I am requesting is some evidence of good faith that this delay will not be repeated at the expiration of the coming contract year. In the meantime I hope you will explore every means at your command to bring the situation to the earliest possible conclusion.

I do not feel as though I am asking too much as I have a lot at stake and have gone along with Packard for three disastrous years and just cannot face another lengthy period under the same conditions. We must get volume with our setup, in order to stay here. You know the story, so will not bore you with repetition.

Glad you are feeling somewhat better. A few days of rest will probably make you feel like a young colt again. I am looking forward towards your next visit.

Very sincerely,

(s) SIDNEY ZELL
Sidney S. Zell

Plaintiff's Exhibit 38

[Letterhead of Packard Motor Car Company, Washington Zone Office]

Received
Mar 28 1952
E. G. McGill

March 26, 1952

Mr. E. G. McGill, Manager
Organization & Analysis Dep't
Packard Motor Car Company
Detroit 32, Michigan

Dear Ev:

This is to advise you that the termination of our dealer, DeBaugh Motors in Towson, Maryland, becomes effective as of March 31, 1952.

It was the decision of top management that we would not recontract this dealer nor would we retain Towson as an open point.

The territory assigned to Towson, Maryland, will be absorbed by the Zell Motor Car Company of Baltimore, Md., and the changes necessitated by this transfer of territory will be incorporated in this dealer's 1952-53 Amendment.

Very truly yours,

M. G. Beck
Zone Manager

cc: Roy Abernethy
Leo E. Fenn

Plaintiff's Exhibit 40

[Letterhead of William E. Leahy]

Di 0558

15 April 1952

Packard Motor Company,
1242-24th Street, N. W.
Washington, D. C.

Gentlemen: Attention—Mr. Marshall G. Beck

I have been retained by the Webster Motor Car Company of Baltimore, Maryland, to press action under the Anti-Trust Acts against your company and the Zell Motor Car Company of Baltimore, Maryland. These charges are based upon the "freeze out" of Packard dealers in Baltimore, resulting in a virtual monopoly of Packard products in favor of the Zell Company and its agents. I am, however, reluctant to file suit, or to take any other action, without discussing the matter with you or your attorney if you care to do so in the immediate future. Accordingly, I would appreciate your advising me in the premises.

Very truly yours,

William E. Leahy

Copy to Leo E. Fenn 4-17-52 (F.T.)

Called 45/18 (2) Left word to call me.

Called 45/21 " " " " "

Called Back 5/1 I told him that we had decided to recontract Webster.

5/15 made appointment for Tues 2 PM 5/20

Plaintiff's Exhibit 41

[Letterhead of Zell Motor Car Company]

Phone—Mulberry 3080
Hamstead 7281
Received
May 15, 1952
C. E. Briggs

May 14, 1952

Mr. Clare E. Briggs, General Sales Manager
Packard Motor Car Company
Detroit 32, Michigan

Dear Clare:

Since your splendid meeting in Washington, the middle of April, I have not heard a word concerning the local situation. I have heard, indirectly, however, that some jockeying for position is going on, and it appears in all probability the matter will not be settled until March thirty-first, next.

As you so graciously told Mr. Proctor, and me in Washington, you would be glad to supplement our verbal agreement with a letter, I would greatly appreciate your doing so; not because there is any question in my mind of the sincerity expressed verbally, but we have many plans in the making to augment our organization in order to strengthen Packard's position in Baltimore. To do this, for the time being, we will be required to make commitments and to incur additional expenses, that under the present circumstances, are not warranted.

Very sincerely,

(s) SIDNEY ZELL
Sidney S. Zell
President

Plaintiff's Exhibit 42

From Mr. C. E. Briggs 8550 Dept.

To F. L. Armstrong 8550 Dept.

Date June 10, 1952

Subject

R. Abernethy

I informed Mr. Zell by telephone today that Webster Motor had been given until the close of business tomorrow, June 11, 1952, to return to the Zone Office an Amendment to its Packard Dealer's Sales Agreement extending the Agreement to March 31, 1953, and that if the extension were not received by five o'clock, Washington time, we would not thereafter entertain any proposal to extend the Agreement and would proceed to conclude the relationship under the "Transactions After Termination" section of the Sales Agreement.

Mr. Zell was entirely satisfied and understands that it is not policy for us to give him the letter requested in his letter of May 14, 1952. He expressed some concern over the possibility that the steel strike might cut off his supply of cars, making it desirable to hold his present cars for a higher price, but later stated he would do his best to help make June "James J. Nance Month."

It was noted that the DeBaugh Dealership at Towson, Maryland still has its sign up although its contract is terminated and is buying cars through Sidney Zell. Mr. Zell does not favor this arrangement but states that he was instructed to make it by Mr. Beck. I seriously question the policy of letting Towson ostensively as a Packard Dealer and suggest that we take immediate steps to remove the

Plaintiff's Exhibit 43

Packard sign or any other indication that he is a franchised dealer.

F. L. Armstrong-f

Received

June 17, 1952
F. L. Armstrong

Reply: June 17, 1952
Thank you for this Report.

(s) C E B

C. E. Briggs

[Armstrong memo was received by Briggs and copy noted and returned to Armstrong]

Plaintiff's Exhibit 43

To ALL DEPARTMENTS

From F. T. Tierney

Copy To
D. P. Crane
E. R. Hale
S. N. Howell
B. F. Marnocha
F. C. Oldenburg
G. R. Wilson

DATE July 8, 1952
Subject

Attached are some up-to-date check sheets which have just been prepared.

I would like to call your attention to the sheet for District #1 in which you will note that the following changes have been made.

Baltimore—Webster has been eliminated

Baltimore—Zell—The quota for this dealership has been increased inasmuch as this dealer has absorbed the entire Metropolitan Baltimore Zone of Influence.

Plaintiff's Exhibit 44

Indian Head, Md.—A portion of this dealer's zone of influence has been taken for the new dealership which has been appointed in Lexington Park, Md. The quota for Indian Head, therefore, has been reduced and this dealer is now classified as a "D" Dealer.

No changes have been made in any of the other districts. Additional check sheets may be obtained from this office upon request.

Sec'y to M. G. Beck

Attached

Plaintiff's Exhibit 44

DEALER CONTACT REPORT

Dealer's City Baltimore Md Zone Wash

Date 9/27/51

Dealer's Name Zell Motor Co Quota

* * *

What Was Accomplished by This Contact?

Held morning Sales Meeting—attended by 6 Salesmen and Mr. Zell—Covered market penetration in detail and the importance of 24th Series clean-up etc.

Mr. Zell has agreed and is trying to hire a Sales Manager and 3 additional salesmen right now.

Explained the Schulte situation to Mr. Zell to his satisfaction.

Mr. Zell is loaded with all models of the cars we are trying to sell right now, but will make every effort to take his share as present stock is reduced.

Signed C. M. Porter

Plaintiff's Exhibit 46

5/20/52

Complete File on Webster Cancellation Given to F. L. Armstrong

F. L. Armstrong

Plaintiff's Exhibit 47

[Letterhead of Packard Motor Car Company, Washington Zone Office]

Received
Jun 20 1952
E. G. McGill

June 18, 1952

Mr. E. G. McGill, Manager
Organization & Analysis Dep't
Packard Motor Car Company
Detroit 32, Michigan

Dear Ev:

This is to advise you that the Packard Dealer's Sales Agreement for The Webster Motor Car Company of Baltimore, Md., has been terminated as of July 11, 1952.

As you know, this dealership has not been re-contracted for 1952-53. In line with Mr. F. L. Armstrong's instructions, a letter was sent to The Webster Motor Car Com-

pany on June 4, 1952, in which we advised them that unless their signed 1952-53 Amendment to the Packard Dealer's Sales Agreement was received in the Zone Office on or before June 11, 1952, their Packard Dealer's Sales Agreement would be terminated on that date.

Inasmuch as this 1952-53 Amendment has not been received as of this time, we are terminating our Sales Agreement with The Webster Motor Car Company effective as of June 11, 1952.

Very truly yours,

M. G. BECK
Zone Manager

Ja: use June 11
cc: Roy Abernethy

P.S. The Zell Motor Car Company of Baltimore, Md., will now handle the Baltimore Metropolitan Area exclusively and the new car quota of this dealership has been changed to the following to include the quotas formerly assigned to The Webster Motor Car Company.

	Permanent Quota	60% Quota
Zell—Baltimore	1001	601

Plaintiff's Exhibit 48

[Letterhead of Packard Motor Car Company, Washington Zone Office]

Received
Mar. 5, 1951
Roy Abernethy

March 3, 1952

Mr. Roy Abernethy
Ass't General Sales Manager
Packard Motor Car Company
Detroit 32, Michigan

Dear Roy:

Zone Organization and Field Activity

* * *

Dealer Attitude

* * *

Problems

Donald Webster, the son of Dick Webster, owner of the Webster Motor Car Company in Baltimore, Md., called me at my home on Saturday. I informed Donald that it was the intention of the Packard Motor Car Company to terminate their Packard Franchise in accordance with a mutual agreement that I had reached with his father. Donald is an attorney and is now working for the U. S. Government in Washington.

Donald stated that it was his opinion that because of his father's investment in Baltimore, it was his intention to recover damages under the "Case Law," should their Packard Franchise be terminated. In view of the fact that Donald is apparently advising his father contradictory to

our original understanding with Dick Webster that he would terminate his Packard Franchise on a mutually satisfactory basis, I strongly feel that any further action in this matter should be handled by our Legal Department.

So that the record will be clear, no definite commitments specifying any particular time that the Webster Motor Car Company will cease to be dealers have been made to the Zell Motor Car Company either written or verbally. Our understanding with Mr. Zell is that we will eliminate the Webster Motor Car Company when we can do it on a legally sound basis with absolutely no stipulation as to when this can be accomplished. Mr. Leo Fenn, Eastern Divisional Sales Manager, can bear witness to this fact as he was present when we again discussed it with Mr. Zell and Mr. Proctor of the Zell Motor Car Company on Friday evening, March 1st.

We have today received the letter from Mr. Armstrong relative to notifying a dealer that we will not renew his Packard Dealer's Sales Agreement, and we are today sending this letter to our dealer, DeBaugh Motors, in Towson, Maryland.

Personnel Productivity

* * *

Product

* * *

Sales Suggestions

Fenn will follow
3/10/52

* * *

Very truly yours,

M. G. BECK
Zone Manager

cc: C. E. Briggs
L. E. Fenn

Plaintiff's Exhibit 49

[Letterhead of Packard Motor Car Company, Washington Zone Office]

Mr. Sidney Zell
Zell Motor Car Company
11 East Mount Royal Avenue
Baltimore 2, Maryland

June 16, 1949

Dear Sidney:

I will apologize for the delay in answering your letter of June 9 which was partly occasioned by my being out in the territory. I sincerely believe that you are correct in your assumption that I am most concerned and interested in the welfare of our exisint dealer organization, both in Baltimore as well as throughout the Washington Zone.

My moves in the Metropolitan Area of Baltimore have been very slow. In order to get the complete picture of what has gone on, I would like to remind you of our conversation shortly after Northwestern Motors was cancelled. At this time I made it my special business to call upon each dealer in Baltimore and explain that Northwestern was coming out of the picture, and that in doing this, the move was being made in order that the remaining three dealers could receive a greater number of cars from the total cars being received by the Washington Zone, knowing that you had high overheads and that you had expenses that could only be met with additional cars.

If you will recall at this time we told you, very definitely, that this was no definite commitment on our part, that another dealer would not be placed in Baltimore at some time in the future, but that the move was only being made in view of our shortage of cars and the fact that it was our desire to support you better than we were able to with four dealers in existence.

Plaintiff's Exhibit 54

We have in general no complaints to make about your operation in Baltimore, or either of the other two dealers there. However, we feel that with an area supporting the population that Baltimore does, and considering the area of Washington, D. C., supporting the number of dealers that it does with its population, that our move in placing one additional dealer in Baltimore is more than justified.

This is not a matter that can be properly settled by correspondence, but is one which we should discuss over a desk from each other. It is my purpose, in the near future, to call upon each of you in Baltimore and discuss this more thoroughly.

Very truly yours,

SAM'L D. BRADEN
Zone Manager

cc: Mr. R. S. Stark

Plaintiff's Exhibit 54

DEALER CONTACT REPORT

Dealer's City Baltimore Md. Zone Wash. Date 10/2/52
Dealer's Name Zell Motor Car Co Quota

* * *

What was accomplished by this contact?

Order for 1953 Announcement Kit.

Mr. Zell & Mr. Proctor do not approve of putting DeBaugh in Bel Air.

They now have 11 Retail Salesmen and intend to hire one more.

Are setting up to wheel & deal and get above average Price Class in Balt:

Signed C. M. PORTER

Plaintiff's Exhibit 55

[Letterhead of Zell Motor Car Company]

M. G. B.
CLIFF. PORTER

September 22, 1952

Mr. Marshall G. Beck
Washington Zone Office
1242 24th Street, N. W.
Washington 7, D. C.

Dear Mr. Beck:

Attached is a clipping from the Jeffersonian paper under the date Sept. 19, 1952, in which Mr. Debaugh is still advertising as a Packard Dealer.

Mr. Porter suggested we send the attached, when available, for your information.

Yours very truly,

ZELL MOTOR CAR COMPANY
G. Dale Proctor
General Manager

Plaintiff's Exhibit 57

[Letterhead of Packard Motor Car Company,
Washington Zone Office]

September 23, 1952

Mr. G. Dale Proctor
Zell Motor Car Company
11 E. Mount Royal Avenue
Baltimore Maryland

Dear Mr. Proctor:

Thank you very much for your note of September 22 and the attached ad from DeBaugh Motors.

I have asked Cliff Porter to handle this matter with Mr. DeBaugh and we, of course, will extend every effort from this office to eliminate a recurrence of this kind.

Thanks again for calling this to our attention.

Very truly yours,

M. G. Beck
Zone Manager

cc: C. M. Porter

Plaintiff's Exhibit 58

NG-3

Mr Wm J Beck

DATE: 9/24/52

Re Dr Baugh - Towson

Mr Dr Baugh agreed to discontinue his advertising in the local Towson paper immediately.

An order has been placed with a local sign company to change the lettering on his sign.

He is interested in Bel Air & is going to contact the new owner of Thompson Building to see if he can make a deal

C. M. P.

FROM: C. M. PORTER

Plaintiff's Exhibit 64

DEALER CONTACT REPORT

B

Dealer's City Balt. Md. Zone Date 4/18/52
Dealer's Name Webster Motor Co. Quota

* * *

What Was Accomplished by This Contact?

Contact made with Mr. Sam Howell.

Mr. French (who signed the present Sales Agreement) was offered the 1952-53 Sales Agreement and he flatly refused to sign.

Sports Library was also presented and a Projection made with Mr. French. He also refused to sign these or any other forms in connection with the 1952-53 Sales Agreement or orders for any Signs or Sales Promotion Material.

Signed C. M. PORTER.

Plaintiff's Exhibit 65

DEALER CONTACT REPORT

B

Dealer's City Baltimore Md Zone Date 4 22 52
Dealer's Name Webster Motor Co Quota

* * *

What Was Accomplished by This Contact?

1952-53 Sales Agreement completely filled in and left with Mr. French, with instructions that the forms were to be completed and returned to the Zone office not later than April 29th 1952

Salon Material is in Showroom Windows with Special ($2596) sign in Window and on front of Bldg.

Signed C. M. PORTER.

Plaintiff's Exhibit 68

SCHEDULE I

DETERMINATION OF AUTOMOTIVE PROFIT-LOSS - BEFORE TAXES ON INCOME

THE WEBSTER MOTOR CAR COMPANY

For the period from April 1, 1952 to December 31, 1953

	April 1, 1952 To December 31, 1952	January 1, 1953 To December 31, 1953	Combined Period From April 1, 1952 To December 31, 1953
PROFIT PER BOOKS	($3,351.56)	($31,285.80)	($34,637.36)
ADDITIONS TO PROFIT			
Direct salary paid to Richard C. Webster	$7,039.59	$ 6,937.50	$13,977.09
Estimated cost of personal services for Richard C. Webster:			
Transportation furnished	750.00	1,000.00	1,750.00
Social Security and insurance	154.83	236.44	391.27
Other personal services	450.00	600.00	1,050.00
TOTAL ADDITIONS TO PROFIT	$8,394.42	$ 8,773.94	$17,168.36
DEDUCTIONS FROM PROFIT			
Dividends and interest on securities	$ 7.60	$ 11.75	$ 19.35
Apportionment of salary paid to and personal services rendered for Richard C. Webster	1,678.88	1,754.79	3,433.67
Recovery of George S. May Co. Payment		3,890.00	3,890.00
TOTAL DEDUCTIONS FROM PROFIT	$1,686.48	$ 5,656.54	$ 7,343.02
NET ADDITIONS	$6,707.94	$ 3,117.40	$ 9,825.34
AUTOMOTIVE PROFIT-LOSS	$3,356.38	($28,168.40)	($24,812.02)
Amortization of leasehold improvements included in the expenses set forth above	$2,829.33	$ 3,458.07	$ 6,287.40

NOTE A—For explanation of apportionment of Richard C. Webster's salary, etc., see SCHEDULE II attached.

SCHEDULE I-A

STATEMENT OF INCOME AND EXPENSE

THE WEBSTER MOTOR CAR COMPANY

Period from April 1, 1952 to December 31, 1953

	January 1, 1952 To December 31, 1952	Less: January 1, 1952 to March 31, 1952	April 1, 1952 To December 31, 1952	January 1 To December 31, 1953	Combined Period From April 1, 1952 To December 31, 1953
Sales	$662,923.26	$174,318.31	$488,605.05	$313,487.15	$802,092.20
Cost of goods sold	549,845.45	140,055.07	409,790.38	273,737.09	683,527.47
GROSS PROFIT	$113,077.91	$ 34,263.24	$ 78,814.67	$ 39,750.06	$118,564.73
Operating expenses	115,706.36	31,243.67	84,462.69	74,934.09	159,396.78
OPERATING PROFIT-LOSS	($ 2,628.45)	$ 3,019.57	($ 5,648.02)	($ 35,184.03)	($ 40,832.05)
Other income	6,323.97	259.63	6,064.34	7,537.99	13,602.33
	$ 3,695.52	$ 3,279.20	$ 416.32	($ 27,646.04)	($ 27,229.72)
Other deductions	5,464.63	1,696.75	3,767.88	3,639.76	7,407.64
PROFIT-LOSS BEFORE TAXES ON INCOME	($ 1,769.11)	$ 1,582.45	($ 3,351.56)	($ 31,285.80)	($ 34,637.36)
Amortization of leasehold improvements included in operating expenses	$ 2,829.33		$ 3,458.07		$ 6,287.40

SCHEDULE II

APPORTIONMENT OF SALARY PAID TO AND PERSONAL SERVICES RENDERED FOR RICHARD C. WEBSTER

THE WEBSTER MOTOR CAR COMPANY

Period from April 1, 1952 to December 31, 1953

Year	Direct Salary	Transportation	Social Security and Insurance	Other Personal Services	Total Benefits To Richard C. Webster	Percent of Richard C. Webster's Time Devoted To Automotive Operations	Amount Apportioned To Automotive Operations
1952 (4-1-52-12-31	$ 7,039.59	$ 750.00	$154.83	$ 450.00	$ 8,394.42	20.00%	$1,678.88
1953	6,937.50	1,000.00	236.44	600.00	8,773.94	20.00	1,754.79
	$13,977.09	$1,750.00	$391.27	$1,050.00	$17,168.36		$3,433.67

Plaintiff's Exhibit 69

SCHEDULE III

LOSS ON FURNITURE AND EQUIPMENT AFTER DECEMBER 31, 1953

THE WEBSTER MOTOR CAR COMPANY

Depreciated book value at December 31, 1953	$2,912.14
Received by sale in 1954	2,811.19
LOSS	$ 100.95

Plaintiff's Exhibit 70

SCHEDULE IV

UNRECOVERED COST OF LEASEHOLD IMPROVEMENTS AT DECEMBER 31, 1953

THE WEBSTER MOTOR CAR COMPANY

Total cost of leasehold improvements	$35,999.76
Less:	
Amount amortized by charges to operations from June 1, 1950 to March 31, 1952	6,763.37
UNAMORTIZED COST AT MARCH 31, 1952	$29,236.39
Less:	
Amount amortized by charges to operations from April 1, 1952 to December 31, 1953	6,287.40
UNRECOVERED COST OF LEASEHOLD IMPROVEMENTS AT DECEMBER 31, 1953	$22,948.99

Plaintiff's Exhibit 70

SCHEDULE V

DETERMINATION OF AUTOMOTIVE PROFITS BEFORE TAXES ON INCOME

THE WEBSTER MOTOR CAR COMPANY

For the period from January 1, 1946 to March 31, 1952

	1946	1947	1948	1949	1950	1951	(1/1-3/31) 1952	Combined
PROFIT PER BOOKS	$42,826.87	$32,444.55	$69,423.43	$16,805.15	$ 9,757.11	$ 1,844.12	$1,582.45	$174,683.68
ADDITIONS TO PROFIT								
Direct salary paid to Richard C. Webster	$15,450.00	$15,562.50	$15,500.00	$14,250.00	$ 9,350.00	$13,310.41	$2,312.50	$ 85,735.41
Loss on sale of securities		1,615.20						1,615.20
Estimated cost of personal services for Richard C. Webster:								
Transportation furnished	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	250.00	6,250.00
Social Security & Insurance	212.44	212.44	212.44	212.44	236.44	236.44	81.61	1,404.25
Other personal services	600.00	600.00	600.00	600.00	600.00	600.00	150.00	3,750.00
George S. May Co. (Recovered 1953)						3,840.26		3,840.26
TOTAL ADDITIONS TO PROFIT	$17,262.44	$18,990.14	$17,312.44	$16,062.44	$11,186.44	$18,987.11	$2,794.11	$102,595.12
DEDUCTIONS FROM PROFIT								
Dividends and interest on securities	$ 2,202.57	$ 1,234.85	$ 525.00	$ 2,165.00	$ 497.00	$ 9.60	$ 2.40	$ 6,636.42
Gain on sale of securities	16,125.27			4,081.67	3,008.90			23,215.84
Apportionment of salary paid to and personal services rendered for Richard C. Webster	3,452.49	3,474.99	3,462.49	3,212.49	2,237.29	3,029.37	558.82	19,427.94
TOTAL DEDUCTIONS FROM PROFIT	$21,780.33	$ 4,709.84	$ 3,987.49	$ 9,459.16	$ 5,743.19	$ 3,038.97	$ 561.22	$ 49,280.20
NET ADDITIONS—DEDUCTIONS	(4,317.89)	$14,280.30	$13,324.95	$ 6,603.28	$ 5,443.25	$15,948.14	$2,232.89	$ 53,314.92
AUTOMOTIVE PROFITS	$38,508.98	$46,724.85	$82,748.38	$23,408.43	$15,200.36	$17,792.26	$3,815.34	$227,998.60
AVERAGE ANNUAL AUTOMOTIVE PROFITS								$ 36,479.78

NOTE—For explanation of apportionment of Richard C. Webster's salary, etc., see SCHEDULE VI attached.

SCHEDULE VI

APPORTIONMENT OF SALARY PAID TO AND PERSONAL SERVICES RENDERED FOR RICHARD C. WEBSTER

THE WEBSTER MOTOR CAR COMPANY

Period from January 1, 1946 to March 31, 1952

Year	Direct Salary	Transportation	Social Security and Insurance	Other Personal Services	Total Benefits To Richard C. Webster	Percent of Richard C. Webster's Time Devoted To Automotive Operations	Amount Apportioned To Automotive Operations
1946	$15,450.00	$1,000.00	$ 212.44	$ 600.00	$17,262.44	20.00%	$ 3,452.49
1947	15,562.50	1,000.00	212.44	600.00	17,374.94	20.00	3,474.99
1948	15,500.00	1,000.00	212.44	600.00	17,312.44	20.00	3,462.49
1949	14,250.00	1,000.00	212.44	600.00	16,062.44	20.00	3,212.49
1950	9,350.00	1,000.00	236.44	600.00	11,186.44	20.00	2,237.29
1951	13,310.41	1,000.00	236.44	600.00	15,146.85	20.00	3,029.37
1952 (1-1-3-31)	2,312.50	250.00	81.61	150.00	2,794.11	20.00	558.82
	$85,735.41	$6,250.00	$1,404.25	$3,750.00	$97,139.66		$19,427.94

Plaintiff's Exhibit 71

SCHEDULE VII

STATEMENT OF INCOME AND EXPENSE—BY YEARS

THE WEBSTER MOTOR CAR COMPANY

Period from January 1, 1946 to March 31, 1952

Year	Net Sales	Cost of Goods Sold	Gross Profit	Operating Expenses	Operating Profit	Add: Other Income		Less: Other Deductions	Profit Before Taxes On Income
1946	$ 333,649.26	$ 228,727.45	$104,921.81	$ 78,360.59	$ 26,561.22	$18,829.56	$ 45,390.78	$ 2,563.91	$ 42,826.87
1947	430,710.22	311,287.07	119,423.15	82,114.43	37,308.72	2,488.67	39,797.39	7,352.84	32,444.55
1948	674,321.72	502,543.62	171,778.10	99,465.38	72,312.72	9,045.35	81,358.07	11,934.64	69,423.43
1949	728,561.91	602,023.01	126,538.90	118,227.13	8,311.77	11,913.06	20,224.83	3,419.68	16,805.15
1950	633,307.94	518,071.27	115,236.67	112,200.07	3,036.60	8,723.78	11,760.38	2,003.27	9,757.11
1951	709,213.86	583,167.96	126,045.90	122,251.86	3,794.04	4,862.23	8,656.27	6,812.15	1,844.12
1952 (1-1-3-31)	174,318.31	140,055.07	34,263.24	28,983.85	5,279.39	259.63	5,539.02	3,956.57	1,582.45
	$3,684,083.22	$2,885,875.45	$798,207.77	$641,603.31	$156,604.46	$56,122.28	$212,726.74	$38,043.06	$174,683.68

Plaintiff's Exhibit 72

SUMMARY OF LOSSES AND DAMAGES CLAIMED

THE WEBSTER MOTOR CAR COMPANY

	Recovery To End of Leasehold Period From April 1, 1952 7¾ Years	9 Years	10 Years	11 Years	12 Years	13 Years	14 Years	15 Years
Automotive loss before taxes on income (4/1 52-12/31/53) SCHEDULE I	$ 24,812.02	$ 24,812.02	$ 24,812.02	$ 24,812.02	$ 24,812.02	$ 24,812.02	$ 24,812.02	$ 24,812.02
Loss on furniture and equipment after December 31, 1953 SCHEDULE III	100.95	100.95	100.95	100.95	100.95	100.95	100.95	100.95
Unrecovered cost of leasehold improvements at December 31, 1953 SCHEDULE IV	22,948.99	22,948.99	22,948.99	22,948.99	22,948.99	22,948.99	22,948.99	22,948.99
TOTAL DIRECT LOSSES	$ 47,861.96	$ 47,861.96	$ 47,861.96	$ 47,861.96	$ 47,861.96	$ 47,861.96	$ 47,861.96	$ 47,861.96
Average annual automotive profits—SCHEDULE V	$282,718.30	$328,318.02	$364,797.80	$401,277.58	$437,757.36	$474,237.14	$510,716.92	$547,196.70
Less:—loss of unrecovered leasehold improvements claimed separately	22,948.99	22,948.99	22,948.99	22,948.99	22,948.99	22,948.99	22,948.99	22,948.99
NET ANTICIPATED PROFITS LOST	$259,769.31	$305,369.03	$341,848.81	$378,328.59	$414,808.37	$451,288.15	$487,767.93	$524,247.71
TOTAL OF DIRECT LOSSES AND NET ANTICIPATED PROFITS LOST	$307,631.27	$353,230.99	$389,710.77	$426,190.55	$462,670.33	$499,150.11	$535,629.89	$572,109.67

NOTE A—The average annual automotive profits for 7¾—15 years have not been discounted to reflect the present value of a lump sum judgment.

Plaintiff's Exhibit 80

[Advertisements in Baltimore Papers]

[Baltimore Sun, July 17, 1951, back page]

PACKARD '51

5—Officials' Cars—5

New Car Title and Warranty

SAVE 10%

WEBSTER

4410 YORK ROAD

'51 PACKARDS

Officials' Cars

All Models & Colors

Some driven less than 100 miles

New Car Titles & Warranties

AS HIGH AS $500 DISCOUNT

SCHULTE-PACKARD

3605 WILKENS AVE.

Cor. Southwestern Blvd.

Phone: Wilkens 3000

Note;

Page 1027 is on card 16.

Plaintiff's Exhibit 31

BM
MGB

DEALER CONTACT REPORT

DEALER'S CITY Baltimore Md ZONE West DATE 9/20/51

DEALER'S NAME Schultz Motor Co QUOTA

Plaintiff's Exhibit 110

5-1-52

F. L. ARMSTRONG

Mr. Abernethy - Burks' letter of Feb. 14, 1952, 4th paragraph, and his reference in paragraph 3 to a "mutual agreement" certainly secured title of Commitment to renew on April 1, 1952.

In my opinion, we could well get a lawsuit based on this letter if we did not renew. Further, I don't know how he can set July 1, 1952 as a duty for Termination unless there exists at that time grounds under the Sales Agreement.

Zone Managers should understand they are not privileged to create special sales agreement without Central Office approval.

R. K. Abernethy

(P.S. Pls destroy this note when matter is settled)

SECTION ONE

PACKARD DEALER'S TEN-DAY SALES ACTIVITY REPORT

PLEASE TYPE OR PRINT

PERIOD ENDING 4-10-52 ZONE Washington

MAIL THIS COMPLETE REPORT (WHITE AND BLUE COPIES) TO ZONE OFFICE ON 10TH, 20TH AND LAST DAY OF EACH MONTH. RETAIN PINK COPY

DEALER NAME Hecht Motor Co CITY & STATE Baltimore Md DEALER'S CODE NO. 803

TWENTY-FIFTH SERIES ONLY

	PACKARD "200"			PACKARD "200 D. L."			PACKARD "250"			"300"	"400"	GRAND TOTAL
	2592 4-DR. SEDAN	2595 CLUB SEDAN	TOTAL "200"	2562 4-DR. SEDAN	2565 CLUB SEDAN	TOTAL "200 D. L."	2577 MAY-FAIR	2579 CONV.	TOTAL "250"	2572 4-DR. SEDAN	2552 4-DR. SEDAN	
NEW CAR STOCK ON HAND END OF PERIOD	√	2	7	4	1	√	1	1	2	3	1	15
NEW CAR DELIVERIES — THIS 10-DAY PERIOD		2	2	1		1						3
NEW CAR DELIVERIES — THIS MONTH TO DATE		2	2	1		1						3
DEMONSTRATORS	1			1						2		4

INSTRUCTIONS

NEW CAR STOCK Enter only new and unused cars on hand. Do not include demonstrators. Do not include cars in transit.

NEW CAR DELIVERIES Enter deliveries for this 10-day period, and for this month to date on lines specified. In Section Two list each delivery. Include all demonstrators, marked as "Demo", which were put in use this 10-day period only.

DEMONSTRATORS Enter all demonstrators in use. When a demonstrator is sold, list again in Section Two; identify by "Previously reported as Demo".

		UNITS	RETAIL VALUE
USED CARS	SALES THIS MONTH TO DATE	6	4665
	TOTAL STOCK END OF PERIOD	29	41270
	30 - DAY CARS (INCLUDED IN ABOVE STOCK)	23	27500

SECTION TWO

PACKARD NEW CAR DELIVERIES

THIS INFORMATION IS NECESSARY TO OFFICIALLY PLACE NEW CARS IN WARRANTY

PLEASE TYPE OR PRINT

PERIOD ENDING 4-10-52 ZONE Washington

DEALER NAME Hecht Motor Co CITY & STATE Baltimore Md DEALER'S CODE NO. 803

	MOTOR NUMBER	VEHICLE NUMBER	NAME OF BUYER	STREET ADDRESS CITY POSTAL ZONE AND STATE	DATE OF DELIVERY
1.	~~211264~~	~~57[illegible]264~~	Charles W Brown	Brookfield Rd Balto 17 Md	4-3-52
2.	~~215933~~	~~575-41013~~	Jack D Stanbaugh	1011 Mt Olivet & King Court Balto 12 Md	4-4-52
3.	~~214536~~	~~562-105~~ 10468	Geo R Conklin	Phoenix Md	4-7-52
4.					
5.					
6.					
7.					
8.					
9.					
10.					
11.					
12.					

V-802-2 40M LPC

ZONE OFFICE COPY

SIGNED BY [signature] (TITLE) [illegible]

[Defendants' Exhibit 39 includes 14 additional Packard Dealer's Ten-Day Sales Activity Reports covering 62 Packard new car deliveries filed subsequent to the filing of the report printed above.]

4/9/52

TO - Webster Tire Co

CITY Baltimore Md DATE 4-7-52

YOUR RETAIL QUOTA FOR APRIL IS

15

DELIVERIES

LET'S ALL MAKE IT - 100%

E. M. Porter

Defendants' Exhibit 41

1142

XXXX

WHAT WAS ACCOMPLISHED BY THIS CONTACT?

Made contact to interview any prospects.
Mr Schultz may have developed to buy his place
of business - Nothing new had developed

Also made contact on Kibler Bros - 3640 Wash Blvd
who own Boulevard Mtr Bldg and a
Mr Wm Hartung - GMC Truck Dealer on Rt 301
Neither of the above could be developed into prospect
or had any leads at this time.

Mr Hartung has been interested in a Pontiac deal
but has given up the idea of the auto business
for the present.

SIGNED C. M. Porter
Porter

Plaintiff's Exhibit 80

[Baltimore Sun, July 26, 1951, back page]

ZELL
GIVES YOU THE
BEST DEAL
ON A BEAUTIFUL
1951 PACKARD
BIG APPRAISALS!
BIG TRADES!
BIG ALLOWANCES!
GET TOP DOLLAR FROM
ZELL
Largest Packard Dealer in Maryland
11 E. Mt. Royal Avenue
Open Evenings till 9

You, too, will own a new
PACKARD
"52 Years of Leadership"
IF YOU SEE
WEBSTER
FOR THE BEST
VALUE IN TOWN
4410 York Rd. BE. 1500

Defendants' Exhibit 42

[Advertisements in Baltimore Sun]

[April 23, 1952, p. 33]

WEBSTER

THE HOME OF ONE-OWNER

USED CARS

'51 PACKARD "200" del sed.
Ultramatic drive New title
'51 STUDE. Comm. Hydra.
'51 HENRY J. 2-Dr.
'50 FORD Cust. "8" 4-Dr. O.D.
'50 CHEV. 4-Dr. Sedan.
'49 DE SOTO conv. cpe.
'50 BUICK spec. sed.
'50 NASH Amb. cl. sed. Hydra.
'49 FORD Cust. "8" cl. cpe.
'48 CHRYS. Town & Cntry sed.
'48 OLDS. "98" sed., Hydra.
'46 PONTIAC sed. coupe
'46 DODGE 4-Dr. Sedan.

MANY OTHERS
FROM $95 TO $1,895

WEBSTER MOTORS
PACKARD DEALERS
4110 YORK RD.
(Greenmount Ave.)
BE. 1500 Open Evenings

[Defendants' Exhibit 42 includes advertisements by Webster similar to the one printed above, published in the Baltimore Sun as follows:

April 9, 1952, p. 36
April 10, 1952, p. 30
April 11, 1952, p. 29
April 13, 1952, p. 21 D
April 15, 1952, p. 28
April 16, 1952, p. 33
April 17, 1952, p. 36
April 20, 1952, p. 30 D]

WEBSTER - AVERAGE TRADING LOSS AND VARIABLE GROSS PROFIT PER NEW CAR SOLD 1950, 1951 and 1st Quarter 1952

	1950	1951	1952 1st qtr.
No. of new cars sold	125	113	34
Av. car gross profit	$695.41	$833.09	$779.10
Av. overallowance	$334.76	$411.06	$342.74
Av. used car gross profit	**243.34**	**336.44**	**233.56**
Av. trading loss	$ 91.42	$ 74.62	$109.18
Av. variable gross profit	**$603.99**	**$758.47**	**$669.92**

ZELL - AVERAGE TRADING LOSS AND VARIABLE GROSS PROFIT PER NEW CAR SOLD 1950-1953

	1950	1951	1952 1st qtr.	1952	1953
No of new cars sold	279	230	77	363	472
Av. car gross profit	$693.07	$798.13	$770.50	$772.67	$810.71
Av. overallowances	$140.89	$147.49	$217.35	$199.37	$241.99
Av. used car gross profit	39.63	18.84	39.48	47.00	19.56
Av. trading loss	$101.26	$128.65	$177.87	$152.37	$222.43
Av. variable gross profit	$591.81	$669.48	$592.63	$620.30	$588.28

Defendants' Exhibit 81J

Packard '300'—the new Boss of the Road. One of nine exciting new models.

It's turning the automobile world upside down!

Never in all Packard history has a new car caught the public favor like this one! *Beautiful?* The Society of Motion Picture Art Directors confirms popular good taste by naming the 1951 Packard *"the most beautiful car of the year!"*

Thrilling to drive? New Packard Thunderbolt engines—with Packard's exclusive Ultramatic Drive (now even finer for '51)—give you the world's most advanced automatic performance!

Wonderful buy! Fact: we're getting the greatest rush of immediate orders we've ever seen! So we urge you again: get *your* order in *early!*

It's more than a car--it's a PACKARD *-the one for '51!*

See it . . . drive it today at your nearest Packard dealer! — Ask the man who owns one

ZELL MOTOR CAR CO.
11 E. Mt. Royal Ave.

WEBSTER MOTOR CAR CO.
4410 York Rd.

SCHULTE MOTORS, INC.
4615 Edmondson Ave.

DEBAUGH MOTORS
Towson, Md.

[Baltimore Sun, November 14, 1950, p. 11]

Plaintiff's Exhibit 80

1028

The Big Swing Is To PACKARD

Big-Car Value At Medium-Car Cost!

1952 PACKARD

"200" 4-DOOR SEDAN delivered in Baltimore

$2596†

†Plus state and local taxes, if any. Optional equipment and white sidewall tires extra. Prices may vary slightly in nearby communities due to shipping charges.

TODAY'S BIG SWING is to Packard—the one automobile offering true big-car comfort, performance and safety *at medium-car cost and economy!* Before you pay $2500 for a car, discover why price-wise buyers are switching to Packard.

● ● **Fresh new colors** accent Packard's smart styling. Roomy interiors are easy to enter through extra-wide doorways. Packard's 3,046 sq. in. of safety glass give you all-around visibility.

● ● **You'd never guess** that such a big car could be so easy to handle and park! Packard's shockproof steering is balanced for finger-tip control. Packard teams its mighty Thunderbolt Engine, *world's highest-compression eight,* with famous Packard Ultramatic*, the automatic drive proved smoother, safer and more dependable than any other! New Easamatic Power Brakes* give faster, easier stops *with 40% less foot pressure!*

● ● **Come in—see and drive** America's most exciting car. Packard's medium-car cost makes it the standout buy today, and the record proves "Built like a Packard" means *built to last!*

ENGINEERED TO OUTPERFORM—BUILT TO OUTLAST THEM ALL!

★★ **Packard Ultramatic*** excels all other automatic drives in smooth performance, safety, dependability.

★★ **New Easamatic Power Brakes*** give you faster, easier stops—require 40% less foot pressure and take 29% less time to apply!

★★ **Packard builds great engines!** Packard's Thunderbolt Engine is the world's highest-compression eight—with up to 25% fewer working parts than in engines of comparable power!

★★ **Packard's new shockproof steering**—balanced for finger-tip control—makes driving and parking easier than ever before.

★★ **You get the world's most** luxurious ride in Packard's all-steel safety body, which is cushioned at all 18 mounting points. Seats are as wide as the car is high!

★★ **Packard's safety-glass area** of 3,046 square inches gives you complete, all-around visibility.

★★ **Handsome new interiors** and fresh exterior color combinations accent Packard's smart, low lines and youthful beauty.

★★ **Every Packard car** undergoes 4,287 separate inspections before it leaves the factory. "Built like a Packard" means *built to last!*

ONLY PACKARD BRINGS YOU NEW EASAMATIC POWER BRAKES* FOR QUICKER, EASIER STOPS!

ASK THE MAN WHO OWNS ONE

*Optional equipment at extra cost. N-24-A

ZELL MOTOR CAR CO.
11 EAST MT. ROYAL AVENUE
Phone MUlberry 3080

[Plaintiff's Exhibit 80 contains other advertisements by or about Baltimore Packard dealers.]

Plaintiff's Exhibit 92

Plaintiff's EXHIBIT NO. 92

ISSUED 5-27-52

SUPERSEDES 12-6-51

B 85

SHEET 1 OF 1

PACKARD MOTOR CAR COMPANY
ORGANIZATION CHART
SALES DIVISION

GENERAL SALES MANAGER
C. E. BRIGGS

EXECUTIVE ASSISTANT
F. L. ARMSTRONG

ASST. GEN. SALES MANAGER
ROY ABERNETHY

PARTS & SERVICE DEPT.
MGR. J. A. CARR

WESTERN&PACIFIC DIVISION
P&S MGR. H. N. JOHNSON

EASTERN DIVISIONAL
P&S MGR. S. C. RIGGS

SERVICE PARTS WAREHOUSE
MGR. D. S. McNALLY
ASST. MGR. C. R. TODD

ORGANIZATION & ANALYSIS DEPARTMENT
MGR. E. G. McGILL

BUDGET CONTROL DEPARTMENT
SPVR. A. B. GRASSEL

BUSINESS MANAGEMENT DEPARTMENT
MGR. R. H. SCHROEDER

NATIONAL USED CAR DEPARTMENT
MGR. W. E. OSBAND

NATIONAL USED CAR DEPARTMENT
ASST.MGR. A.L. DAVIS

SALES PROMOTION DEPARTMENT
MGR. C. D. THOMAS

CAR DISTRIBUTION DEPARTMENT
MGR. N. C. DESANTIS

CUSTOMER DRIVEAWAY DEPARTMENT

PACKARD MOTOR CAR CO. OF CANADA, LTD., WINDSOR
MGR. F. C. WILLIAMS

- HALIFAX ZONE — MGR. F. H. LANGILLE
- MONTREAL ZONE — MGR. L. C. HOFMENS
- TORONTO ZONE — MGR. J. A. SMETHURST
- CALGARY ZONE — MGR. J. G. PATTERSON
- WINNIPEG ZONE — MGR. W. T. POWELL
- VANCOUVER ZONE — MGR. K. A. CRUISE
- VICTORIA ZONE — MGR. A. deM. MELLIN

EASTERN DIVISIONAL
SALES MGR. L. E. FENN

- NEW YORK ZONE — GEN. MGR. C.W. FROTHINGHAM; MGR. C. H. EVANS; ASST. MGR. C. H. NOLL
- BOSTON ZONE — MGR. B. E. MEADOWCROFT; ASST. MGR. T. A. COUPE
- SYRACUSE ZONE — MGR. MARK PAGE
- PHILADELPHIA ZONE — MGR. C. D. YENGLING; ASST. MGR. F. S. BREUIL
- WASHINGTON ZONE — MGR. MARSHALL G. BECK
- PITTSBURGH ZONE — MGR. M. A. SAUNDERS
- ATLANTA ZONE — MGR. R. A. BLOUNT; ASST. MGR. H. G. ASH

CHICAGO
RETAIL & REAL ESTATE
W. R. BELLOWS, GEN. MANAGER

WESTERN
DIVISIONAL SALES
MGR. E. J. PLATFOOT

- CHICAGO ZONE — MGR. S. D. BRADEN; ASST. MGR. E. S. GROSS
- MINNEAPOLIS ZONE — MGR. C. M. RITCHEY
- KANSAS CITY ZONE — MGR. H. J. HOFFMAN; ASST. MGR. D. E. COLLINS
- ST. LOUIS ZONE — MGR. M. C. ERNER
- DALLAS ZONE — MGR. V. E. DOONAN; ASST. MGR. E. N. PRICHARD
- DETROIT ZONE — MGR. F. W. GARBISS; ASST MGR. L. W. STEVENS
- CINCINNATI ZONE — MGR. H. O. DOYLE

PACIFIC
DIVISION

- SAN FRANCISCO ZONE — MGR. H. T. MARTIN; ASST. MGR. C. P. PRATT
- LOS ANGELES ZONE — MGR. G. A. WAGNER
- PORTLAND ZONE — MGR. R. J. FROISETH
- SALT LAKE CITY ZONE — MGR. R. C. FREED
- RENO ZONE — MGR. T. N. BROWN; ASST. MGR. T. R. FORSYTHE
- PHOENIX ZONE — MGR. R. H. BOWYER; ASST. MGR. S. H. BOWYER

PROCEDURE CONTROL UNIT

Section 2 - Page 3
Revised 5-27-52

Plaintiff's EXHIBIT NO. 92

DONALD D. WEBSTER
ATTORNEY AT LAW
4410 YORK ROAD
BALTIMORE 12, MD.

11:30 A.M. Saturday March 1, 1952

This morning at approximately 10:30 A.M. I called Mr. Marshall Beck at his home for the purpose of arranging an interview concerning his proposal that the Webster Motor Car Co. be liquidated and Dad's position in that matter. Beck was suffering with a bad cold and suggested that we discuss the matter the next time, over the phone.

He told me that when he received Dad's letter in response to his of Feb. 14th, 1952, he was surprised that Dad was unwilling to proceed with prompt liquidation. He reported that he forwarded the letter on to the Packard factory and that they sent the Eastern District Divisional Sales Manager on to Washington. He reported that he and that official (I'm not 100% sure of that title) went to Baltimore yesterday for the purpose of discussing the problem of Webster Motor Car Co liquidation with Sidney Zell. They had lunch together - whether more than the three were present was not made plain. Beck assured me that Sidney Zell would be extremely fair in any liquidation proposition which Dad wished to discuss with him. Beck also tried to assure me that Zell did not know that the factory intended not to renew our franchise, but I am sure Zell knew.

Beck said that he felt Dad did not "need the money" and that it would be in Dads' best interest to liquidate and he stressed that Dad had not been able to devote full time to the Packard business.

He asked me pointedly what the factory's policy was concerning metropolitan dealerships (1)

Defendants' Exhibit 24
1088

~~Dad~~ - in particular as to Baltimore. He answered that it was the factory's current policy for Baltimore to "think in terms of one metropolitan dealership". I told him that then the problem was merely whether it would be Zell or Webster. He responded that there was no problem since the factory intended not to renew ~~cancel the~~ Webster franchise. I asked him if that meant that Webster would not get a renewal agreement at the end of March, 1952. He said that he assumed it did and assured me that he was just carrying out orders from Detroit.

I told him that Dad would not want to impede the policy of the factory (to establish one dealership in Baltimore) but that it would be vital that Dad be given an opportunity to sell his business - probably to Zell - as a going business. He responded that Dad would have nothing but tangible assets to sell. I said, "What about the Good Will". He responded that in liquidation Good Will would be worth nothing. I reminded him that Dad did not intend to liquidate but rather to sell out as a going business at a reasonable price, while leasing the real estate at a fair rental. He became a little riled and reminded me that the franchise agreement was to be terminated at the end of March. I then reminded him that if Dad had known that the factory was going to change from a highly competitive dealer policy (Zell, Scott, Schultz and Webster) to one metropolitan dealership policy (Zell) he would never have taken their advice (i.e. the advice of Buick & Braden) to buy the property, to rebuild it, to purchase the new machinery stocks & fixtures that he did after the fire in the fall of 1949, & said that they had not encouraged Dad to invest as Dad claims over and above "$100,000" in Packard. I said that was then a dispute of fact. And I reminded him that since they had never given Dad any reason to believe his franchise agreement would be terminated until they decided on a metropolitan dealership plan, I was of the opinion that they could not terminate his franchise until Dad had been given a reasonable opportunity to wind

[Defendants' Exhibit 42 includes advertisements similar to the one printed above, published in the Baltimore Sun as follows:

April 18, 1952, p. 6
May 2, 1952, p. 19]

The Big Swing Is To PACKARD

Big-Car Value At Medium-Car Cost!

1952 PACKARD
"200" 4-DOOR SEDAN
delivered in Baltimore

$2596†

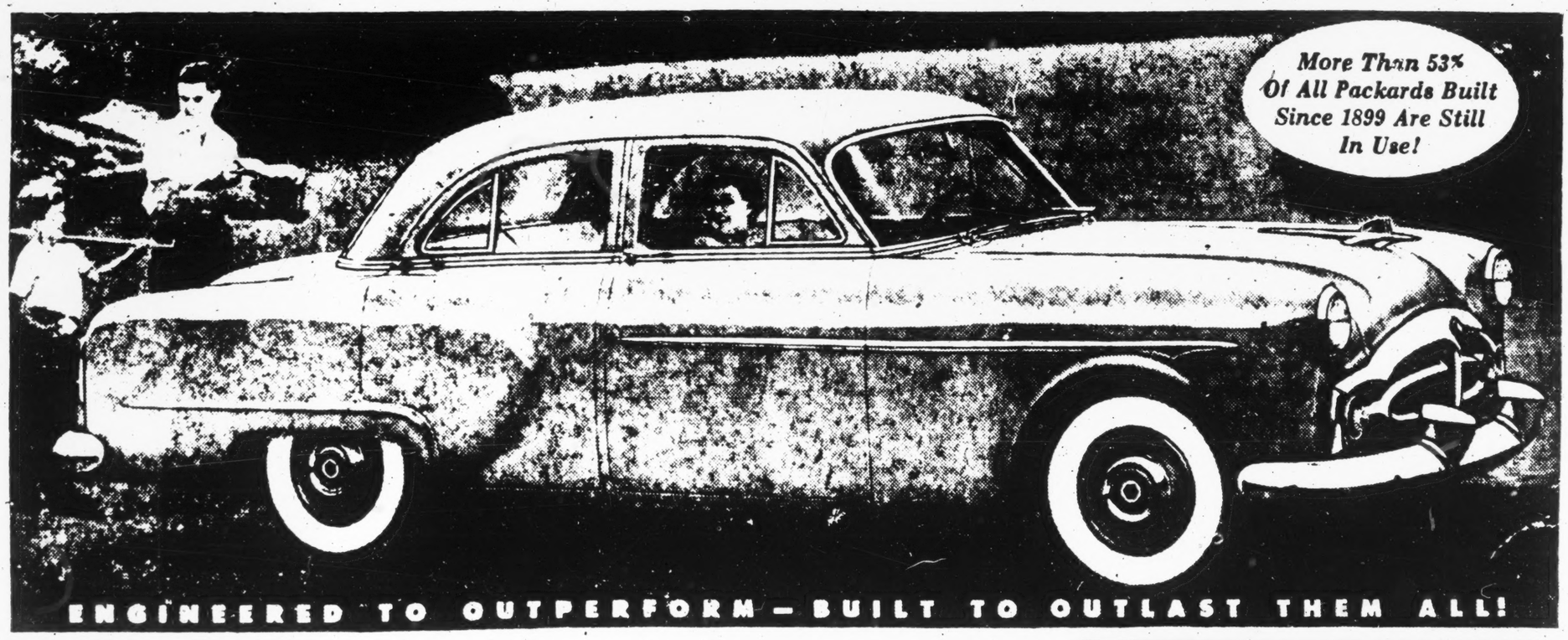
†Plus state and local taxes, if any. Optional equipment and white sidewall tires extra. Prices may vary slightly in nearby communities due to shipping charges.

TODAY'S BIG SWING is to Packard—the one automobile offering true big-car comfort, performance and safety *at medium-car cost and economy!* Before you pay $2500 for a car, discover why price-wise buyers are switching to Packard.

● ● **Fresh new colors** accent Packard's smart styling. Roomy interiors are easy to enter through extra-wide doorways. Packard's 3,046 sq. in. of safety glass give you all-around visibility.

● ● **You'd never guess** that such a big car could be so easy to handle and park! Packard's shockproof steering is balanced for finger-tip control. Packard teams its mighty Thunderbolt Engine, *world's highest-compression eight,* with famous Packard Ultramatic*, the automatic drive proved smoother, safer and more dependable than any other! New Easamatic Power Brakes* give faster, easier stops *with 40% less foot pressure!*

● ● **Come in—see and drive** America's most exciting car. Packard's medium-car cost makes it the standout buy today, and the record proves "Built like a Packard" means *built to last!*



ENGINEERED TO OUTPERFORM—BUILT TO OUTLAST THEM ALL!

★ ★ **Packard Ultramatic*** excels all other automatic drives in smooth performance, safety, dependability.

★ ★ **New Easamatic Power Brakes*** give you faster, easier stops—require 40% less foot pressure and take 29% less time to apply!

★ ★ **Packard builds great engines!** Packard's Thunderbolt Engine is the world's highest-compression eight—with up to 25% fewer working parts than in engines of comparable power!

★ ★ **Packard's new shockproof steering**—balanced for finger-tip control—makes driving and parking easier than ever before.

★ ★ **You get the world's most** luxurious ride in Packard's all-steel safety body, which is cushioned at all 18 mounting points. Seats are as wide as the car is high!

★ ★ **Packard's safety-glass area** of 3,046 square inches gives you complete, all-around visibility.

★ ★ **Handsome new interiors** and fresh exterior color combinations accent Packard's smart, low lines and youthful beauty.

★ ★ **Every Packard car** undergoes 4,287 separate inspections before it leaves the factory. "Built like a Packard" means *built to last!*

ONLY PACKARD BRINGS YOU NEW EASAMATIC POWER BRAKES* FOR QUICKER, EASIER STOPS!

*Optional equipment at extra cost. N-24-A

ASK THE MAN WHO OWNS ONE

ZELL MOTOR CAR CO.
11 E. Mt. Royal Ave.
Baltimore 2, Md.

WEBSTER MOTOR CAR CO.
4410 York Road
Baltimore 18, Md.

Defendants' Exhibit 42
[June 11, 1952, p. 17]

Plaintiff's Exhibit 84

[Telegram]

MR. D. C. MC NALLEY MGR.
PACKARD MOTOR CAR CO.
FACTORY PARTS & ACC. WAREHOUSE
UTICA, MICH.

VERY IMPORTANT THAT ABSOLUTELY NO SHIPMENT BE MADE TO WEBSTER MOTOR CAR CO. BALTIMORE MD. FROM THIS DATE ON. WILL CONFIRM ON REGULAR REPORTING FORM.

BECK—PACKARD

Plaintiff's Exhibit 86

DEALER CONTACT REPORT

Dealer's City Washington Zone Wash Date 6/11/52

Dealer's Name Zone Office re Webster Quota

* * *

What was accomplished by this contact?

In Z. O. helping in preparation of Charts for Zone Meeting June 12 & 13

Delivered letter to Hughes & Leahy office in reply to their letter re Webster franchise

Signed C. M. PORTER

Plaintiff's Exhibit 88

DEALER CONTACT REPORT

Dealer's City Wash. D. C. Zone Wash. Date 6/9/52

Dealer's Name—re: Webster Motor Car Co.—Baltimore

Quota

* * *

What was accomplished by this contact?

In Zone office—working on June Quota Bulletin to Dealers re Retail Sales for Mr Nance for June

Meeting with Webster's Lawyer with Mr Beck.

Signed C. M. PORTER.

Plaintiff's Exhibit 90

[Letterhead of Packard Motor Car Company,
Washington Zone Office]

This copy to: Mr. F. L. Armstrong
Administrative Assistant.
Factory—Detroit

From: The Wash. Zone Office

Received
Jun 4 1952
F. L. Armstrong

June 2, 1952

Mr. E. G. McGill, Manager
Organization & Analysis Dep't
Packard Motor Car Company
Detroit 32, Michigan

Dear Ev:

This will reply to your communication of May 29 relative to the Webster Motor Car Company in Baltimore, Maryland.

The re-signing of this dealer has met with some legal difficulties and our procedure in connection with the Webster Motor Car Company is being directed by Mr. F. L. Armstrong and our legal department.

At the present time I am sorry to say that I cannot give you any definite information as to when this dealership will be re-contracted.

Very truly yours,

M. G. Beck
Zone Manager

cc: F. L. Armstrong

Plaintiff's Exhibit 91

[Letterhead of Packard Motor Car Company, Washington Zone Office]

Noted
C E B

Attached

~~C. E. Briggs~~ noted
~~F. L. Armstrong~~ F L A

To Note & R
R A

Received
May 29, 1952
Roy Abernethy

Received
Jun 16, 1952
F. L. Armstrong

May 27, 1952

Mr. Roy Abernethy
Ass't General Sales Manager
Packard Motor Car Company
Detroit 32, Michigan

Dear Roy:

I am attaching a copy of a resume of my conception of the conference which we had with the Attorneys for The Webster Motor Car Company last Tuesday, May 20.

We certainly enjoyed your visit, Roy, and will be looking forward to seeing you again in the not too distant future.

Very truly yours,

M. G. Beck
Zone Manager

Attached

Plaintiff's Exhibit 91

MEMORANDUM:

Subject: Conference with Attorneys of The Webster Motor Car Company and Donald Webster on Tuesday, May 20, 1952.

A conference was held with Mr. Donald Webster and the Attorneys for The Webster Motor Car Company in the office of the Attorneys at 821-15th Street, N. W., Washington, D. C. Those present were: F. L. Armstrong, Administrative Assistant—Sales Division, and Roy Abernethy, Ass't General Sales Manager, representing the Packard Factory; M. G. Beck, Zone Manager, and C. M. Porter, City Manager, representing the Washington Zone Office; Donald Webster of The Webster Motor Car Company, and the Attorneys for The Webster Motor Car Company, Mr. Hughes and Mr. Leahy.

The purpose of the conference was to find out just what The Webster Motor Car Company intended to do and what their specific charges would be in their threatened law suit.

At first Mr. Donald Webster was reluctant to make any statement whatsoever on the premise that the men present from the Packard Factory were not lawyers. After some discussion, however, and on the advice of Mr. Leahy and Mr. Hughes, Donald Webster did state his feelings as to the conditions as they exist in the minds of the owners and officers of The Webster Motor Car Company.

Mr. Donald Webster declared that he is now a Vice-President of The Webster Motor Car Company; however, his name does not appear on our 1951-52 Amendment to the Packard Dealer's Sales Agreement, or in any part of that Agreement which we have with this company.

Plaintiff's Exhibit 91

Donald Webster presented his case by starting with the period when his father, Richard Webster, was a salesman for Zell Motor Car Company, and went on through his becoming a dealer under Zell who was then a distributor and finally as a dealer under the Washington Zone Office. Donald presented photostatic copies of letters to show that they were at one time cancelled by Zell and later signed again as dealers under terms which they did not consider entirely satisfactory to Webster.

Donald then discussed the contact made by Mr. Porter and the writer on Mr. Richard Webster at Salisbury, Md., (at which time Mr. Webster voluntarily agreed to retire from the automobile business in Baltimore). Donald then brought up a letter which I sent to Mr. Richard Webster confirming the agreement made at Salisbury, and Donald contended that this was entirely contrary to Mr. Richard Webster's thinking.

Donald then covered the second contact made with Mr. Richard Webster at Deal Island, Md., by Ben Marnocha, Zone Business Manager, C. M. Porter, City Manager, and the writer, at which time we offered Mr. Webster a Sales Agreement dated to expire on July 1, 1952, which Mr. Webster flatly refused to sign.

He then discussed the contact made by Mr. Porter and Mr. Sam Howell at their place of business in Baltimore with Mr. Harry French, the President of The Webster Motor Car Company but not a Stockholder. At the time of this visit, Mr. Porter went through all the details of signing a Sales Agreement and even made a new car projection which Mr. French refused to sign as well as the Sales Agreement even though he had signed the former Sales Agreements as President of The Webster Motor Car Company. At that time Mr. French requested that we leave the

Sales Agreement with him for discussion with Mr. Webster and other members of the organization. This request was refused by Mr. Porter on the grounds that it was not our usual procedure. Mr. Donald Webster contended that we had done so in the past.

Mr. Richard Webster and Mr. Donald Webster are not active in the operation of the Packard Franchise in Baltimore. Mr. Richard Webster operates an oyster business at Deal Island, Md., and Mr. Donald Webster is employed as a lawyer by the U. S. Government in Washington, D. C. This was brought out on questioning by Mr. Armstrong and Mr. Abernethy and admitted to be true by Donald Webster. Mr. Webster stated that although they do not take an active part in the operation of this business, it nets them a return of $35,000 a year on a very small original investment and it is their feeling that this is too good a return on their money for them to lose.

It was also brought out by Mr. Donald Webster that they had a fire in 1949 and that they bought the property and re-constructed the building on the recommendations of the representatives of the Packard Motor Car Company.

Mr. Donald Webster also brought up the fact and inferred that he did not like the fact that we had terminated the Sales Agreement of DeBaugh Motors in Towson, Md. He seemed to be very familiar with the facts and details of the contact made by Mr. Howell, Zone Parts & Service Manager, and Mr. Porter, City Manager, on Mr. DeBaugh in Towson, in reference to the termination of this Agreement. He was also cognizant of the fact that Mr. DeBaugh had made an agreement with Mr. Sidney S. Zell of Zell Motor Car Company in Baltimore to continue to sell Packard Cars as a Sales Associate. None of this information was given to him by any member of our organization!

Plaintiff's Exhibit 91

It was then pointed out to Donald Webster that the Sales Agreement offered to Mr. French in his place of business in Baltimore was the only Sales Agreement that we have and was identically the same in every detail as the Sales Agreement signed by all other Packard Dealers. Mr. Webster seemed to feel that there was a difference because the Sales Agreement offered to him at Deal Island, Md., was to expire on July 1, 1952. Both Mr. Armstrong and Mr. Abernethy explained to Mr. Webster that the expiration date did not have anything to do with the terms of the Agreement with the exception of the expiration date, that we cannot extend the Sales Agreement beyond a one-year period, and that all expiration dates are the same throughout the United States, but that a Sales Agreement could be shortened.

Mr. Donald Webster then stated that we later presented them with a Sales Agreement completely made out but not signed by the writer, and as per their request, had left that Sales Agreement in their hands on April 22, 1952, with instructions that it was to be returned to the Zone Office by April 29. This Sales Agreement was not signed nor was it returned to the Zone Office.

Mr. Webster was then pointedly asked what they intended to do and whether they were planning to sign the Sales Agreement, and he stated that this decision could not be made until they had a meeting of their Board of Directors.

It was then decided that they would arrange a meeting of the said Board of Directors before the end of this week, or May 24, and would advise us promptly of their decision.

M. G. Beck
Zone Manager

Note:

Page 1038 is on card 17.

Plaintiff's Exhibit 93

[Letterhead of Packard Motor Car Company, Washington Zone Office]

C. E. Briggs

To note & R

F. L. Armstrong—

Advice please
or let's discuss.
RA

Received
May 9 1952
Roy Abernethy

May 7, 1952

Mr. Roy Abernethy
Ass't General Sales Manager
Packard Motor Car Company
Detroit 32, Michigan

Dear Roy:

This has further reference to our telephone conversation of yesterday.

I am attaching a copy of a letter which we have just received from Mr. William E. Leahy, Attorney for the Webster Motor Car Company, which is self-explantory.

I will await your advice and instructions before taking any further steps in regard to this matter.

Very truly yours,

M. G. Beck
Zone Manager

Attached

cc: Leo E. Fenn

Plaintiff's Exhibit 93

[Letterhead of William E. Leahy]

6 May 1952

Mr. Marshall G. Beck,
Zone Manager, Packard Motor Co.
1242-24th Street, N. W.
Washington, D. C.

Dear Mr. Beck: Re: Webster Motor Car Co.

Confirming our conversation with you of today, I think the most constructive approach to the Webster Motor Car matter would be for you to put your counsel in touch with us as soon as convenience will permit and then we as lawyers could look into the matter further.

Thanking you, I am

Sincerely,

WILLIAM E. LEAHY

PACKARD MAY 1952 PACKARD

DEALER STANDING DIST NO I WASHINGTON ZONE

SALES VS. QUOTA

RANK	DEALER	QUOTA	SALES	% OF QUOTA
1	McNey-Kel. - Wash, D.C.	12	18	150.0%
1	*College Park, Md.	6	9	150.0%
1	Westminster, Md.	6	9	150.0%
4	Bethesda, Md.	15	22	146.6%
5	Silver Spring, Md.	18	26	144.4%
6	*Indian Head, Md.	3	4	133.3%
7	Hicks - Wash, D.C.	12	15	125.0%
8	Webster - Baltimore	12	14	116.6%
9	Arlington, Va.	12	13	108.3%
9	Alexandria, Va.	12	13	108.3%
	DISTRICT NO. I	190	202	106.3%
11	Annapolis, Md.	4	4	100.0%
11	Elkton, Md.	3	3	100.0%
11	Bel Air, Md.	3	3	100.0%
14	Zell - Baltimore	33	31	93.9%
15	Retail Branch, Wash, D.C.	20	12	60.0%
16	Martinsburg, W. Va.	4	2	50.0%
17	Frederick, Md.	3	1	33.3%
18	Fredericksburg, Va.	4	1	25.0%
18	Winchester, Va.	4	1	25.0%
18	Hagerstown, Md.	4	1	25.0%

INCLUDES 24TH SERIES DELIVERIES

*Credited with one sale missed on last month's ranking!

Plaintiff's Exhibit 94

1041

Plaintiff's Exhibit 95

[Letterhead of Packard Motor Car Company, Washington Zone Office]

C. E. Briggs To Note RA Noted CEB

April 23, 1952

Mr. Roy Abernethy
Ass't General Sales Manager
Packard Motor Car Company
Detroit 32, Michigan

Dear Roy:

This will acknowledge your letter of April 21 relative to Mr. Bradford E. Blake, Jr., who seems to know more about DeBaugh Motors in Towson, Md., than I am able to learn.

A letter was sent to Mr. DeBaugh stating that we were not going to re-sign his Packard Dealer's Sales Agreement, in accordance with a letter that we received from Mr. F. L. Armstrong.

Cliff Porter and Sam Howell handled the termination of this dealership insofar as our responsibility in the contract was concerned. They have informed me that there was no discussion whatsoever as to the Zell Motor Car Company in regard to this action.

However, we did feel that this could be developed into an Association Salesman deal and, as a result, Mr. DeBaugh is carrying on as an Associate Salesman under the Zell Motor Car Company and he will, therefore, continue to give service as in the past.

Very truly yours,

M. G. Beck
Zone Manager

cc: L. E. Fenn

Received
Apr 25 1952
Roy Abernethy

Plaintiff's Exhibit 96

DEALER CONTACT REPORT

Place Baltimore Md.

Dealer Webster Motor Car Co.

Date 4/21/52 Time Spent 8 hrs.

Dealership Class A √ B C D OP

Service Manager Elmer Sewell

Parts Manager John Duplaise

Date Last Contacted Signature R G Funk

* * *

PARTS & ACCESSORIES: Good Management—good wholesale business

DOES THIS DEALER USE LUSTUR SEAL? Yes √

SERVICE DEPARTMENT: Good

CUSTOMER RELATIONS: Good.

Technical: Good

USED CAR RECONDITIONING: Good—car kept clean & ready to go.

* * *

REMARKS: Karl Becker Service Mgr. left last week: Elmer Sewell temporary Mgr.: Parts Manager. John Duplaise leaving this Week

Plaintiff's Exhibit 98

Received
May 1 1952
L. E. Fenn

Date April 18, 1952

From Mr. C. E. Briggs Subject

To Leo E. Fenn

Attached is a copy of the letter I 'phoned you about Thursday sent to Marshall Beck by attorney William E. Leahy with regard to the Webster Motor Car Company of Baltimore, Maryland.

After our telephone conversation, we tried to contact Mr. Leahy to pass the information along to him as given me by you. However, we were advised by Mr. Leahy's office that he was out of town and would not return until some time Saturday.

Mr. Cliff Porter, District Manager of the Washington Zone, is contacting the Webster Motor Car Company today to have them sign the Sales Agreement for the ensuing year.

Mr. Beck will try to contact Mr. Leahy Saturday, and if not successful will contact him Monday.

Leo E. Fenn—jd

April 29, 1952

As you know, we have authorized Marshall Beck to renew the Webster Motor Car Company's contract for another year. This particular situation was reviewed in detail and agreed to by Mr. Sidney Zell, our other Baltimore Dealer.

CEB

C. E. Briggs—hr

Plaintiff's Exhibit 99

DEALER CONTACT REPORT

Dealer's City Balt. Md. Zone Wash. Date 4/18/52
Dealer's Name Zell Mtr Co. Quota

* * *

What was accomplished by this contact?

Contact made with Mr. S. Howell. Checked on Spring Salon Decorations and Set-up Packard Cutaway Engine in Dealers Showroom.

Signed C. M. PORTER.

Plaintiff's Exhibit 100

[Packard Motor Car Company. Washington Zone Office]

Received
Apr 10 1952
Roy Abernethy

Mr. Roy Abernethy
Ass't General Sales Manager
Packard Motor Car Company
Detroit 32, Michigan

April 7, 1952

Dear Roy:

Zone Organization and Field Activity

* * *

Dealer Attitude

* * *

Problems

On April 3, 1952, Cliff Porter, City Manager, Ben Marnocha, Zone Business Manager, and myself contacted Dick Webster, owner of the Webster Motor Car Company in Baltimore, at Deal Island, Maryland.

Plaintiff's Exhibit 100

We told Mr. Webster that on the basis of our previous contact on February 13, 1952, we had made certain commitments and that we expected him to liquidate his Packard business and terminate his Packard franchise. Dick stated that if there was no alternative he would be forced to abide by this decision.

We then explained to him that the 1952-53 Amendment to the Packard Dealer's Sales Agreement contained a clause relative to the return of Packard Parts, which clause is not in effect in his present Agreement, and that we would accept a new Agreement with him with a July 1, 1952, termination date. Dick stated that he has not signed previous agreements personally, and that he would, therefore, discuss this matter with his son, Donald, who is a lawyer and would come into my office within the next few days.

We were very specific in pointing out to Dick Webster, so that there could be no doubt about his understanding, that it was the full intention of the Packard Motor Car Company that he should liquidate his Packard business in Baltimore.

Personnell Productivity

* * *

Product

* * *

Sales Suggestions

* * *

Very truly yours,

M. G. Beck
Zone Manager

cc: C. E. Briggs
L. E. Fenn

Plaintiff's Exhibit 105

[Letterhead of Packard Motor Car Company, Washington Zone Office]

March 31, 1952

Mr. Roy Abernethy
Ass't General Sales Manager
Packard Motor Car Company
Detroit 32, Michigan

Dear Roy:

Zone Organization and Field Activity

* * *

Dealer Attitude

* * *

Problems

One day this week I will personally contact Dick Webster and endeavor to renew his Sales Agreement with a July 1, 1952, termination date inserted in the new agreement.

Personnel Productivity

* * *

Product

* * *

Sales Suggestions

* * *

Very truly yours,

M. G. Beck
Zone Manager

cc: C. E. Briggs
L. E. Fenn

Plaintiff's Exhibit 106

DEALER CONTACT REPORT

Place: Baltimore, Md.
Dealer: Webster Motor Company
Date Last Contacted:

Date: 3/28/52 Time Spent: 8½ hrs.
Dealership Class: A V B C D OP
Service Manager: Karl Becker
Parts Manager: John Duplaise
Signature: R. G. Funk

* * *

PARTS & ACCESSORIES: Sell 14 Purolator. Parts management good. Good stock.

DOES THIS DEALER USE LUSTER SEAL? Yes.

SERVICE DEPARTMENT: Sell—Safety Campaign.

CUSTOMER RELATIONS: Good. Talk to 2 owners on product & straighten out complaints.

Technical: Good: bulletins up to date—Serviceman bulletins to date.

USED CAR RECONDITIONING: Good. Clean merchandise.

PARTS & ACCESSORIES MERCHANDISING RECORD: Up to date.

P.P.C.P. Installed Dec 51 (date) Size of System 24 Make of Bins Berloy & Lyon

Modern Bin Labels Yes. (make) Access. Displayer Yes

Show Case Yes. (yes - no)

Poster Service Frames Yes (Yes - No)

REMARKS: Service operation picking up on Parts & Labor

Sales: Discussed Sales of accessories to General Mgr, Service Mgr & Parts Mgr.

Plaintiff's Exhibit 107

DEALER CONTACT REPORT

Dealer's City: Balt., Md. Zone: Wash. Date: 3/27/52

Dealer's Name Zell Mtr. Car Co. Quota:

* * * *

What was accomplished by this contact?

1952-53 Sales Agreement Signed

" " Sports Library Order Signed

Upholstery & Paint Samples Ordered

Cadillac Direct Mail Brochure Ordered

Dealer turned down Window Signs and Safety Campaign Material due to lack of space to use them

Please note change in territory—from that shown on 198 Chart—Towns in Montgomery County deleted. Should go to Silver Spring

Signed C. M. PORTER

Plaintiff's Exhibit 109

[Letterhead of Packard Motor Car Company
Washington Zone Office]

"REGISTERED MAIL"

March 4, 1952

Mr. Franklin DeBaugh
DeBaugh Motors
103 E. Penna. Avenue
Towson, Maryland

Dear Mr. DeBaugh:

This is to inform you that we will not extend your Packard Dealer's Sales Agreement which expires by its own terms on March 31, 1952, nor will we enter into a new Packard Dealer's Sales Agreement with you.

Upon expiration of this contract, we request that you proceed to terminate our relations in accordance with the provisions of the Sales Agreement, and we will be ready to fulfill our obligations under the same termination provisions.

Yours very truly,

PACKARD MOTOR CAR COMPANY
(Washington Zone Office)

M. G. Beck
Zone Manager

Note:

Page 1051 is on card 16.

Plaintiff's Exhibit 113

PACKARD

Used Car Merchandising

March 15, 1951

To: PACKARD DEALERS

cc: Zone Managers

Gentlemen:

We've had a good many requests for help in moving '48 and '49 used Packards. It seems that so many of our customers like our new styling they are offering their old cars at a faster rate than you can move them.

The remedy we have to offer will take a little time, but if followed will produce results.

* * *

We hope you'll try it long enough to make it work.

Yours very truly,

W. E. Osband, Manager
National Used Car Department

Plaintiff's Exhibit 122 For Identification

ZELL MOTOR CAR COMPANY

Packard

BALTIMORE, MARYLAND

August 31st. 1938

Zell Motor Car Company,
Baltimore, Maryland

Gentlemen:—

In view of the fact that our Company has been reinstated as a Packard Dealer in Baltimore City, we agree, at all times, as long as we handle Packard Products, to abide by the following rules and regulations. These rules and regulations, we believe will promote harmony and are for the best general interests of all Packard Dealers and the Distributors in Baltimore City. We thoroughly understand that these rules and regulations cannot be changed except by the Distributor, the Zell Motor Car Company, by written notice.

The Rules and Regulations are listed below:—

1. We shall not solicit nor attempt to sell any Packard owner, sold by the Distributor, except those names listed on sheet attached. We agree to use utmost tact and diplomacy in cases where an owner of Distributor or Dealer, requests an appraisal from us.. We agree not to make any statements, which in effect will give the owner the impression that he is compelled to purchase his car from anyone source, and we further agree to give owner a low appraisal, which will probably cause the owner to return to store where he originally purchased his Packard.

2. We shall co-operate at all times with Distributor and Dealers on allowances.

AUTOMOBILE SALESMEN

This advertisement is directed to two experienced, ambitious, energetic men who are tired of multiple dealership competition.

Take advantage of this opportunity to make a lifetime connection with Maryland's oldest dealers sales department.

Enjoy top-bracket income merchandising the fastest selling, lowest sales resistance cars ever afforded the American public.

You will enjoy our dignified sales program.

Phone Mr. Proctor for appointment.

ZELL

11 E. MT. ROYAL. MUL. 3080.

AUTOMOBILE SALESMEN

Packard sales are steadily increasing beyond the capacity of the manpower of our present sales force. We need two ambitious, energetic salesmen.

If you can qualify, increased earnings are assured and you will be very pleased with our business methods and surroundings.

Only top quality men will be considered. No multiple dealer competition.

ZELL PACKARD

11 E. Mt. Royal Ave. MU. 3080

Plaintiff's Exhibit 122 For Identification

3. We agree not to solicit anyservice work from owners of our Distributor under any conditions.

4. No advertising of any kind or description to be sent to Packard owners, without first obtaining permission from Distributor.

5. No advertising, except our regular used car advertising, to be placed in any paper, without consent of our Distributor. No advertising of any type to be inserted in any daily papers, other than the classified used car section, without permission of Distributor. No radio advertising of any kind to be used.

6. To give up immediately upon termination of present lease, our building located at 15 West Mt. Royal Ave. Our lease expires approximately January 8th. 1939. Any other location must be approved by the Distributor.

7. To conform our service charges to rates set by the Distributor and factory.

We believe, by conforming to the above rules, that most of the contention between the Zell Motor Car Company, and ourselves, will be eliminated. We further agree not to write any letters to the factory condemning our Distributor, as we have done in the past, but to transact our business with the factory through our Distributor, as we are supposed to do, and as all the other Packard Dealers are doing.

We understand that any violation of this letter will result in our immediate cancellation.

Very truly yours,

WEBSTER & MACHEN, INC.

Plaintiff's Exhibit 124.

[Copies of advertisements by Zell Motor Car Company in Baltimore Sun papers, the first appearing in both the Morning and the Evening Sun of September 3, 1952 and in the Morning Sun of September 24, 1952, and the second appearing in The Evening Sun on March 12, 1953]

AUTOMOBILE SALESMEN

This advertisement is directed to two experienced, ambitious, energetic men who are tired of multiple dealership competition.

Take advantage of this opportunity to make a lifetime connection with Maryland's oldest dealers sales department.

Enjoy top-bracket income merchandising the fastest selling, lowest sales resistance cars ever afforded the American public.

You will enjoy our dignified sales program.

Phone Mr. Proctor for appointment

ZELL

11 E. MT. ROYAL. MU. 3080

AUTOMOBILE SALESMEN

Packard sales are steadily increasing beyond the capacity of the manpower of our present sales force. We need two ambitious, energetic salesmen.

If you can qualify, increased earnings are assured and you will be very pleased with our business methods and surroundings.

Only top quality men will be considered. No multiple dealer competition.

ZELL PACKARD

11 E. Mt. Royal Ave. MU. 3080

Plaintiff's Exhibit 128

Mr. S. N. Howell, Washington Zone Office

February 11, 1952

Mr. Sidney S. Zell
Zell Motor Car Company
11 E. Mount Royal Avenue
Baltimore, Maryland

Dear Mr. Zell:

The following are the deliveries made by the Schulte Motor Company in the last 90 days as reported on his 10-day reports.

Name & Address	Del. Date
Dr. Henry Eckhardt 301 Marydel Road	11-1-51
Louis Pillsbury Glenn Burnie, Md.	11-8-51
John Dorsey 122 N. Allendale	11-15-51
Philip Wolfe 2703 Cold Spring Lane	11-13-51
Albert Merrone 4763 Aldgate Green	11-30-51
Perry Schall 963 Argonne Drive	11-27-51
Pearl Colisimo Rogers Avenue Ellicott City	12-1-51

Plaintiff's Exhibit 128

Name & Address	Del. Date
F. Brown Irving Street Arlington, Va.	12-1-51
Helen Gallagher 429 Dowry Lane	12-19-51
Calvert Leach 3310 Windsor	12-13-51
Jesse Cassady 91 Airport Road Bladensburg, Va.	1-5-52
Leonard Zerhusen 2438 W. Franklin	1-4-52
Theo. Graff 102 Ventnor Terrace	1-12-52

Any additional sales that come in on 10-day reports from this dealership will be forwarded to you. As of January 30, the stock report shows only (1) 2492 and (1) 2465.

Very truly yours,

C. M. Porter
City Manager

cc: Dale Proctor
Tom Orpwood
S. N. Howell

Plaintiff's Exhibit 129

B
J. Thomas

February 24, 1954

Mr. S. S. Zell
Zell Motor Car Company
11 E. Mt. Royal Ave.
Baltimore 2, Maryland

Dear Sydney:

It was a pleasure to spend last Friday with you. The averages which we discussed are enclosed. They cover the dealership in Kansas City where the competitive factor is stronger than it is in Baltimore. You will find these helpful in reviewing your own situation and making such adjustments as will prove profitable.

In reviewing our day together, we concurred that it was possible for you either to make operating changes or set up controls internally which would bring some of your variable accounts into proper focus and that these resulting economies should add between 40 and 60 thousand dollars to your operating profit.

It seems to me that your Sales Manager should have been giving you forecasts of what he proposed to produce in the way of variable net and that your Service Manager should have been providing you with projections on his estimate of his fixed gross profit. Then, against these your Office Manager should have been setting up the variable and fixed expense projections which would have been indicating the direction in which your business would proceed. Actually,

Plaintiff's Exhibit 129

I am one of those who have long been committed to the idea that a daily operating control based on these kind of figures is a must in our business today. Just before leaving the other afternoon the idea of closing your books on the 25th of the month in order to get your statement out by the 10th was brought out. I did not want to take the time to involve your Office Manager in a discussion of that subject because of the time involved and then I would not have been able to leave your fair city until Saturday. In all of the operations with which I have had any relationship, we have insisted that all records be posted daily and that the statement be out no later than the 5th of the month. In a number of dealerships we have our statement out regularly on the 3rd, even though this ocassionally involved minor adjustments in accounts payable where all the statements were not in prior to the closing time. It doesn't take any longer to do these things daily. Then, if you are to maintain a daily operating control they have to be done that way.

You might say that this is just a matter of detail, that the score will be the same regardless of whether it is done early in the month or by the 10th. The surprising thing is that most department managers, once they know that you are maintaining a daily operating control, will do much better work because they are aware of the fact that you are keeping an eye on both their sales and expense control. All of us are prone to work toward a target, if that is kept in front of us continually.

In summary, you have a wonderful business and a marvelous opportunity profit-wise. The market potential is much greater than even your present new car sales indicate. When you put under control just the few items which we have talked about, a good net profit is bound to result and I be-

lieve you see this picture now just as clearly as I do. If it is desirable for us to have someone from our Washington Zone Office work with either your Sales Manager, your Service Manager, or your Office Manager, we will be glad to furnish such assistance.

If we can render any further service to you we will be only too glad to cooperate at any time.

Sincerely,

Harry E. Foulkrod
Eastern Sales Manager

attachments (2)

CC: C. E. Briggs
Marshall Beck

[Letterhead of I. Leslie Lawrence]

October 19, 1954.

Mr. Harry W. Gambrill
Zell Motor Car Company
11-19 E. Mt. Royal Ave.
Baltimore-2-Maryland

Dear Harry:—

Had hope to be in Baltimore before this time for a few days but it now appears it will be three or four weeks before I can get away from here.

Was anxious to talk to you about the new Clipper I purchased through you as it would appear that the Zell Motor Co. made an error of some kind in billing the car sold me on September 27th, 1954. The standard price scheduled

by the Packard Motor Car Company, checked by me through two dealers, shows a cost of $3,482.95 computed as follows:—

Car delivered	$ 2,930.00
Ultramatic drive	199.00
Heater	79.50
Radio	102.00
Power Brakes	43.00
Fender Shields	21.45
White side walls	32.50
Oil Bath	8.70
Oil filter	11.80
Undercoating	35.00
Blue Coral	20.00
Total Cost	$ 3,482.95

Please advise exactly how the price of $3,840.00 was computed.

One Dealer will sell me a car for $2,900.00 and allow $1,500.00 for the old car and another offered a new car for $3,000.00 and allow $1,500.00 for the old car. Both cars are the same model and same equipment as car sold me. The Dealers offered a discount of $500.00 and $600.00 respectively from the list price.

Naturally I am not too happy to know that by dealing with a friend of a long time it cost me more than $1,000.00 I had enough confidence in you to think that you would do the square thing by me. I still hope this to be true.

In computing the cost the windshield washer of $11.75 was not included nor the rubber mats as these items were

Plaintiff's Exhibit 129

promised after you stated the entire cost would be $2,500.00 and my car. As you know the washer and mats are to be installed when I come to Baltimore.

Trusting to receive a prompt reply with an explanation of the difference in the cost as scheduled by the Packard Company and that charged by the Zell Company, I am,

Very truly yours,

I. Leslie Lawrence.

Zell Motor Car Company

Packard

Baltimore-2-Maryland.

October 22, 1954

Mr. I. Leslie Lawrence
Central Ave. at 48th St.
Ocean City, N. J.

Dear Leslie:

Your letter of the 19th came as a shock to me for the last thing I ever want to do is to take advantage of anyone, least an old friend.

First, I will explain to you that all Baltimore Car Dealers have been padding their retail prices forcing us to do so to be able to cope with their high trade allowances. This overcharge is added into the appraised price of the used car. Here is the actual retail delivered price of your

Plaintiff's Exhibit 129.

car in Baltimore with the equipment you have and also that which is due you.

$3521.90
2912.45 — Actual cost of the car as equipped to us

609.65 — Difference

Your used car appraised for $800.00. We allowed you $1,340.00 for it—$540.00 over appraisal on the $3,840.00 price—$222.00 over appraisal on the $3522.00 price. So that the deal sums up this way—

$ 609.65 — Gross before over allowance
222.00 — Over allowance

387.65 — Gross Profit
125.00 — 5% Sales Commission on $2,500.00

262.65 — Net

As our cost to do business is figured at 10% of the cost price of the car, which amounts to $291.24, our net loss is $28.79 and we still have a service obligation for 90 days, or 4,000 miles, whichever comes first, so you can see by this, Leslie, that we will never get rich selling cars this way.

I am awfully sorry any question should arise that would make you think that I would take advantage of you, but I cannot understand the actions of some dealers.

Trusting to see you when you return, I am,

Very truly yours,

Zell Motor Car Company
Harry W. Gambrill

Plaintiff's Exhibit 129

I. Leslie Lawrence October 22, 1954

Cost—F.O.B. Detroit

$2718.00	— Cost to us including equipment from factory
90.60	— Freight
50.00	— Retail preparation and conditioning
30.00	— Undercoating and Blue Coral
4.00	— Mats
3.00	— 10 Gallons of Gas
16.85	— For new type window washer including installation
$2912.45	

RETAIL PRICE—Delivered in Baltimore

$2815.00	— Advertised price at factory
90.60	— Freight
50.00	— Retail preparation and conditioning
21.45	— Fender Shrouds
42.50	— Advertising
$3019.55	
199.00	— Ultramatic Drive
81.50	— Heater
102.00	— Radio RPM
43.00	— Power Brakes
32.50	— White Sidewall Tires
8.70	— Oil Bath
11.80	— Oil Filter
16.85	— New type window washer including installation
7.00	— 2 Mats
$3521.90	

I hereby certify that the above statements and letter are a true and correct copy without any change whatsoever.

I. Leslie Lawrence.

Plaintiff's Exhibit 129

[Letterhead of I. Leslie Lawrence]

October 29, 1954.

Mr. Harry W. Gambrill
Zell Motor Car Company
11-19 E. Mt. Royal Ave.
Baltimore 2, Maryland.

Dear Harry:—

Receipt is acknowledged of your letter of the 22nd inst. in which you attempt to explain or justify the policy of the Zell Motor Car Co. in overcharging prices on cars sold

The list price of the car delivered in Baltimore, less Window Washer and two mats which were not included in the original negotiations, is, according to your letter, $3,498.05 yet you charged $3,840.00 adding what you call a "padding retail price" of $341.95 and this overcharge is presumed to be adjusted in the trade-in allowance.

In my opinion this method of doing business is a gross misrepresentation and fraud and should not be condoned by any reputable organization.

Before taking any action I will make a special trip to Baltimore to discuss this matter with you and ascertain exactly what adjustment you will propose. Will try and contact you the latter part of next week.

Very truly yours,

I. Leslie Lawrence.

Plaintiff's Exhibit 129

[Letterhead of I. Leslie Lawrence]

December 4, 1954.

Mr. Sidney S. Zell, President
Zell Motor Car Company
11 E. Mt. Royal Avenue
Baltimore 2, Maryland.

Dear Mr. Zell:—

In connection with our discussion on Saturday November 20, 1954 regarding the purchase of a 1954 Packard Clipper you stated that you would get all the necessary information in connection therewith and write me on Monday the twenty second of November advising me what amount you would allow in connection with the apparent overcharge or "retail padding price."

No information of any nature has been received by the writer. Why?

As I anticipate leaving here for my Baltimore home on Tuesday next would suggest that you contact me in Baltimore.

Very truly yours,

I. Leslie Lawrence.

Plaintiff's Exhibit 131

SUMMARY OF LOSSES AND DAMAGES CLAIMED

THE WEBSTER MOTOR CAR COMPANY

	Recovery To End of Leasehold Period From April 1, 1952 7-3/4 Years	9 Years	10 Years	11 Years	12 Years	13 Years	14 Years	15 Years
Automotive loss before taxes on income (4/1/52-12/31/53) SCHEDULE I	$ 24,812.02	$ 24,812.02	$ 24,812.02	$ 24,812.02	$ 24,812.02	$ 24,812.02	$ 24,812.02	$ 24,812.02
Average annual automotive profits--SCHEDULE V	$260,628.34	$296,249.33	$323,432.56	$349,570.42	$374,702.90	$398,868.76	$422,105.16	$444,447.85
TOTAL OF DIRECT LOSSES AND NET ANTICIPATED PROFITS LOST	$285,440.36	$321,061.35	$348,244.58	$374,382.44	$399,514.92	$423,680.78	$446,917.18	$469,259.87

NOTE A--In accordance with a suggestion of the Court, the average annual automotive profits for 7-3/4--15 years have been discounted to reflect the present value of a lump sum judgment. This was done by Wyatt Co., Actuaries, 1029 Vermont Ave., N. W., Wash., D. C., according to factors and methods in Hart - Mathematics of Investment, Third Edition, Heath and Co.. A 4% discount rate was employed. The profits for the first 2-1/2 yrs. were not discounted (1953, 1954, first 6 mos. 1955).

Defendants' Exhibit 1

[Letterhead of The Webster Motor Car Company]

March 4, 1950

Mr. Samuel D. Braden
Packard Motor Car Company
1242—24th Street, N. W.
Washington 7, D. C.

SDB

Dear Sam:

I know you will understand the spirit in which this letter is written. It is written in the hope that what I say will contribute to the welfare of the Packard dealers, the factory and Packard owners. I very deeply feel that unless something is done about the following matter, grave consequences to all three are bound to follow.

I am imbued with a Packard pride and spirit born of nearly a lifetime in Packard's service. I have always been proud to represent Packard and to be a part of its old and honorable family. Lately, the Baltimore public must have received from Baltimore dealer-advertising a type of impression which I feel is most detrimental to these dealers, as well as to the factory.

I am enclosing an advertisement that appeared on the back page of the March 1 Morning Sun. I am convinced, Sam, that such advertising, no matter which dealer is guilty of it, does not create one additional Packard sale in this territory. I am equally convinced that by its overtones or its flavor, or by creating the impression it does, call it what you will, it makes the man who has finally firmly decided to buy a Packard leave the dealer who has patiently persuaded him that Packard is the only car.

Defendants' Exhibit 1

Is this leave-taking permanent? Maybe yes, maybe no; because the man-about-to-become-a-Packard-owner then goes from Packard dealer to Packard dealer, getting each one to compete against the other. The result; the buyer gets the car of his dreams; the dealer who has "won" the sale by overallowing, i.e. in effect wholesaling, gets red ink; the salesman who worked perhaps months to prove to the buyer that Packard was best, gets a, "Sorry, but X allowed me $100 more. You know how it is." Thus, the Packard factory gains nothing but dog-eat-dog dealers and an under-the-table sales reputation.

I realize that the factory wishes healthy competition, when such competition is directed against Buick, Chrysler, Cadillac and others; but, I am equally confident that the factory does not wish every prospective Packard purchaser to go from one Packard dealer to the other until he has purchased a Packard at cost or less. Such a policy is a guarantee that all Packard dealers must close up.

Some time ago, since action begets reaction, a race developed in this territory to see which dealer could advertise the cheapest sale of a new Packard to the public. Webster—Packard, "Means a Good Deal"; Scott "Will give a top trade"; others, "We will not be outtraded". I got in touch with Harry French and advised that all of our Sun back-page ads should feature only the price of Packard delivered. A copy of this ad which has appeared some half dozen times, is attached. But, such advertising cannot bring us results when advertisements, the like of which appeared in March 1st Morning Sun are permitted.

Packard dealers are anxious to do their utmost to obtain their share of the market. I feel that Young & Rubicam have worked up some small advertisements for dealers

which are advantageous to Packard and which should bring profit to the dealer so advertising. Surely we all wish to get back on the profit side. I feel that if the factory stresses some of our old principles such as "one price to everyone", "you don't have to be a horse trader to buy a Packard", in their guidance to their dealers, much good will result. The only way a Packard dealer can profit is to create a desire for Packard ownership, and then to receive those deals which because of his efforts he rightly deserves.

In conclusion, I respectfully protest that advertisements such as the one in the March 1st Morning Sun offset and nullify the spirit and initiative that aggressive salesmen and Packard dealers should have. We have no objections to this dealer, as such. Rather we feel that his advertising policies are destructive and detrimental to the other Baltimore Packard dealers and salesmen. If that feeling is justified, the factory, too, is a loser.

Very truly yours,

R. C. Webster

[Advertisements enclosed in letter]

PICK PACKARD
PICK SCHULTE
(Means a Good Deal)

The Highest Trader This Side
Of The Mason-Dixon Line

6400 Frederick Rd. GI. 2356

2-16-50
PACKARD
$2323
DELIVERED BALTIMORE
WEBSTER

4410 York Rd. BE. 1500

Defendants' Exhibit 2

QUESTIONNAIRE

YOUR MAILING COPY

This questionnaire is intended to convey to the Packard Motor Car Company, Field Buildings and Real Estate Department, a good idea of the size of your operation and personnel involved, both present and future. It should be filled out with the aid of a Zone Office Representative.

The Packard Motor Car Company's Field Buildings and Real Estate Department is prepared to cooperate with you in the planning of alterations to your existing building, or layouts for a complete new building.

In order that there will be no misunderstanding about the responsibility for the work you are contemplating, we wish to have it definitely agreed that anything we do in connection with furnishing you with suggestions or advice will in no way affect the contractual relations as outlined in your Packard Sales Agreement.

By this we mean that we do not assume any responsibility and our suggestions, advice, plans or blue prints do not contemplate that there is any change in the cancellation provisions contained in the said Sales Agreement.

If this arrangement is satisfactory, please sign this statement.

FOR: DEALER or PROPOSED DEALER

WEBSTER MOTOR CAR CO.
Name of Dealer

By H. L. French, Pres.
Title

For: PACKARD MOTOR CAR COMPANY
Washington Zone Office

Date Nov. 30, 1949

Sam'l D. Braden

Mail to: Field Buildings & Real Estate Dept.
Packard Motor Car Company
1580 East Grand Boulevard—Box 117
Detroit 32, Michigan

Defendants' Exhibit 10

[Letterhead of The Webster Motor Car Company]

April 9th 1952

Packard Motor Car Co.
Washington Zone Office
Att. Mr. George Wilson
Zone Car Distributor
1242 – 24th st. N. W.
Washington 7 – D. C.

Dear George:

Please order the following cars (16) for us for the month of May.

2595– S –STD. TRANS.	*3325*
2595– K –STD. TRANS.	*3324*
2592– D –STD. TRANS.	*3323*
2592– K –STD. TRANS.	*3322*
2565– H –AT-HE-BU-WS.	*3321*
2562– D –AT-HE-BU-WS.	*3320*
2562–BH–AT-HE-BU-WS.	*3319*
2562– K –AT-HE-BU-WS.	*3318*
2562– S –AT-HE-BU-WS.	*3317*
2562– X –AT-HE-BU-WS.	*3316*
2562– O –AT-HE-BU-WS.	*3315*
2562– G –AT-HE-BU-WS.	*3314*
2572– X –AT-HE-RPE-BU-SF-WS.	*3311*
2577–XT–AT-EHE-RPE-BU-SF-WS-TRIM # 491	*3313*
2579– D –AT-HE-RPE-BU-WS-BLACK TOP-TRIM # 896	*3351*
2552– G –HE-RPE-BU-S.F.-WW-BL-WS. TRIM # 703	*3152*

Sincerely

H. L. FRENCH

Defendants' Exhibit 15

Washington Zone

June 13, 1951

Mr. C. E. Briggs,
Assistant General Sales Manager

Dear Mr. Briggs:

The following dealers were contacted in the Washington Zone:

Hagerstown, Md. — Price Class — 5.5%

* * *

Lynchburg, Va. — Price Class — 6.1%

* * *

Danville, Va. — Price Class — 9.1%

* * *

Greensboro, N. C. — Price Class — 4.7%

* * *

Arlington, Va. — Price Class — 5.8%

* * *

Baltimore — (Webster) — Price Class — 5.3%

Work Conference disclosed:

1. Accounts Receivable
2. Used Cars
3. Trading
4. Manpower needed
5. Absorption
6. Fixed Expenses

Defendants' Exhibit 15

We as Packard are very weak in the city of Baltimore. Price Class shows 5.3%, but this is a little improvement over 4.8% of last year. The April and May registrations will really give us a true picture.

About a year ago, we visited Webster at the time of the salon showing and it was agreed that he was definitely in need of a used car lot and additional manpower, if we were to get the business in the city. Mr. Webster still needs additional manpower and no attempt was made to get a used car lot. I requested Mr. Beck to see that this dealer gets a used car lot within the next thirty days. He now has a used car problem and I am sure that their price class will drop considerably and with his high variable gross profit per car of $1017 you can see that there will be very little progress made, if any. In fact, the variable gross profit per car for the other two dealers is high also.

This being a metropolitan area, I requested Mr. Beck to have a meeting with these three dealers and get an understanding as to whether or not they are going out to sell Packards or if it will be necessary for us to replace the dealer that we lost.

Washington — (Loving Motors) — Price Class 4.6%
(Jan. thru March) 1950 Price Class 5.1%

* * *

E. J. Platfoot — 11

Defendants' Exhibit 16

[Letterhead of Packard Motor Car Company, Washington Zone Office]

Received
Jan 4 1952
R. M. Schroeder

January 2, 1952

Mr. Ross H. Schroeder, Manager
Business Management Department
Packard Motor Car Company
1580 E. Grand Boulevard
Detroit, Michigan

Dear Ross:

The following is a list of dealers considered to be Problem Dealers even though all of them have not been contacted:

Dealer	Reasons
1. Baltimore—Zell	Loss dealer; low new car volume
2. Bethesda, Maryland	Loss dealer; low variable gross; additional manpower.
3. Hagerstown, Maryland	Loss dealer; additional liquid capital and manpower. Plan program for additional prospects with looser trading.
4. Washington—Loving	Loss dealer; low new car volume; 30-day unit prob-

Defendants' Exhibit 16

Dealer	Reasons
	lem. Need for additional Used Car manpower. Big overhead; salesmen need direction.
5. Washington—McNey	Loss dealer; working capital; Additional new and used car manpower.
6. Raleigh, North Carolina	Loss dealer; Used Car problem. Additional manpower needed.
7. Charlottesville, Va.	Loss dealer; Used Car Problem; Additional manpower needed.
8. Covington, Va.	Loss dealer; need for Used Car salesmen.
9. Greensboro, N. C.	Loss dealer; need for additional New and Used Car salesmen; more demonstrators; Used Car problem; excessive salary of $1000 per month for owner; sales direction needed.
10. Petersburg, Va.	Loss dealer; working capital; need for two new and one used car salesmen; used car lot; used car problem.
11. Arlington, Va.	Working Capital; additional manpower.
12. Baltimore—Webster	Working Capital; Used Car problem; used car lot; additional manpower; looser trading.

Defendants' Exhibit 16

Dealer	Reasons
13. Martinsburg, W. Va.	Working Capital.
14. Washington—Hicks	Working Capital; additional manpower.
15. Winchester, Va.	Working Capital; Service Department building; handle service in own building.
16. Harrisonburg, Va.	Working Capital; additional manpower; more prospects; additional service volume.
17. Frederick, Maryland	Working capital; low new car volume.
18. Wilson, North Carolina	Working capital; additional manpower; complete service operation.

In cases where, from information available to you, a dealer appears to be a problem but actually is not, you will be notified.

Regards.

Very truly yours,

(S) BEN. MARNOCHA
B. F. Marnocha
Zone Business Manager

Defendants' Exhibit 16A

CLOSED POINTS
Number 67
Total Contract Quota 5,515

Chart 155
September 3, 1951
19 Terrible Towns

WASHINGTON ZONE

Quota	Dealer Point	Dual
4.4 150	Alexandria, Va.	
48	Annapolis, Md.	
150	Arlington, Va.	
2.1 48	Asheboro, N. C.	
60	Aulander, N. C.	
150	Baltimore, Md. (Schulte Motor Sales, Incorporated)	
5.1 175	Baltimore, Md. (The Webster Motor Car Company)	
400	Baltimore, Md. (Zell Motor Car Company)	
2.8 36	Bel Air, Md.	
200	Bethesda, Md.	
24	Big Stone Gap, Va.	
36	Bluefield, W. Va.	Hudson
48	Bristol, Tenn.	
50	Burlington, N. C.	Crosley
2.8 50	Charlottesville, Va.	Willys
24	Clinton, N. C.	
5.5 100	College Park, Md.	
40	Covington, Va.	
100	Danville, Va.	Willys
100	Durham, N. C.	
24	Elizabeth City, N. C.	Hudson
24	Elkton, Md.	
100	Fayetteville, N. C.	
24	Franklin, Va.	
4.2 36	Frederick, Md.	
1.6 48	Fredericksburg, Va.	Hudson
3.6 36	Goldsboro, N. C.	
4.1 100	Greensboro, N. C.	
48	Grundy, Va.	
4.4 60	Hagerstown, Md.	
4.2 36	Harrisonburg, Va.	Willys
60	Henderson, N. C.	
50	High Point, N. C.	

Defendants' Exhibit 16A

	Quota	Dealer Point	Dual
	36	Indian Head, Md.	Willys
3.1	48	Kinston, N. C.	Hudson
	24	Lewisburg, W. Va.	
	24	Lexington, N. C.	
	48	Lumberton, N. C.	
	72	Lynchburg, Va.	
	36	Martinsburg, W. Va.	
	36	Mount Airy, N. C.	
	50	New Bern, N. C.	Hudson
	175	Newport News, Va.	
	250	Norfolk, Va.	
3.9	75	Petersburg, Va.	
	100	Portsmouth, Va.	
	36	Princeton, W. Va.	
	150	Raleigh, N. C.	
2.8	36	*Reidsville, N. C.	
	250	Richmond, Va.	
	125	Roanoke, Va.	
4.9	50	Rocky Mount, N. C.	
	24	Sanford, N. C.	
	225	Silver Spring, Md.	
	36	Staunton, Va.	
	24	Tazewell, Va.	
	24	Towson, Md.	
	150	Washington, D. C. (Hicks Motors, Inc.)	
4.6	300	Washington, D. C. (Loving Motors)	
3.9	48	Washington, N. C.	
	48	Westminster, Md.	
	24	Whiteville, N. C.	
	100	Wilmington, N. C.	
	48	Wilson, N. C.	
4.0	72	Winchester, Va.	
	100	Winston-Salem, N. C.	
	36	Wytheville, Va.	

*Not Recontracted

Everett G. McGill, Manager
Organization & Analysis Dept.
Packard Motor Car Company

Defendants' Exhibit 17

COPY

September 24, 1951

To Mr. C. E. Briggs
From E. J. Platfoot

Subject

ZONE AND DEALER CONTACTS

G

Copy to K. M. Greiner

The real purpose of my visit to Washington after the one recently made was to follow through on what appeared to be changes in the dealer organization in the metropolitan area. On my previous visit a new dealer on Rhode Island Avenue was signed, and appointments for a later date were made for Mr. Lerner of Loving Motors, Inc. and Mr. Winchester of Alexandria, Virginia.

Loving Motors, Inc., Washington, D. C.

* * *

Winchester, Incorporated (Alexandria, Virginia).

* * *

Spurrier Motors, Incorporated (Arlington, Virginia).

* * *

Capitol Motor Company, Incorporated (Silver Spring, Md.).

* * *

The Covington Motor Company (Bethesda, Md.).

* * *

Follin's Service (College Park, Md.).

* * *

The Webster Motor Car Company (Baltimore, Md.). Had a meeting with Messrs. Webster, both Senior and

Defendants' Exhibit 17

Junior, the sales manager and the office manager. After listening to Mr. Webster as to the reasons why he has not been doing a better job, it was necessary for us to review with him his high gross profit per car which, in fact, is higher than that of any other dealer in the metropolitan areas of Baltimore and Washington.

After he looked over these figures, Mr. Webster said that he has not been as close to the business as he probably should be and, of course, the big reason for the high gross and few sales is because his trading has been very tight, which reflects in the gross profit of his used cars. The total gross profit for this dealer equals 35% as against a Zone average of 24%. These figures are also on the attached summary.

Mr. Webster agreed to get a used car lot. I reminded him that his son and the sales manager agreed to this over eight months ago, and today they are still in a cramped position in trying to sell used cars. However, he has now definitely agreed to get a lot, and Mr. Beck will follow through on this assignment.

Zell Motor Car Company (Baltimore, Md.). Mr. Beck and I had a meeting with Mr. Zell in regard to the signing of three dealers in Baltimore. Mr. Zell was informed by Mr. Schulte, himself, that he has given us a mutual cancellation, and Mr. Zell felt that this was the time to bring up the subject of the number of dealers we should have in Baltimore.

Mr. Schulte now has an ad in the papers to sell out his business. However, it would be a sale to anybody that would appear on the scene, regardless of whether they were representing a competitive make of car. So, therefore, he appears to be holding Packard just until he makes a sale. I feel

that it would be impossible for him to get a party interested in the Packard franchise in his present frame of mind because he has let it be known all through the city of Baltimore that it is impossible to make money with the Packard franchise.

Although the Zone had a mutual cancellation signed by this dealer, there was no date set as to when Mr. Schulte would give up Packard. I have requested that the Zone get a definite date on this mutual cancellation.

Due to the fact that Mr. Zell is familiar with this mutual cancellation from Schulte Motor Sales, Incorporated, he was very much interested in knowing whether we were going to put another dealer in Baltimore because he wanted to make his plans immediately. By that he meant that he would give up the Packard franchise because year-to-date the return on his investment has been very small, and with the possibility of a shortage of cars, he feels he would lose money.

He assured us that if we would go along for the present time with only two dealers and not install a third one, he would set up an organization with our assistance and would make up the 100 cars that Schulte has sold this year. He showed us that 60% of what Mr. Schulte had sold were prospects of his. He also agreed that if this did not prove satisfactory to Packard, he would then feel better about a third dealer in Baltimore and would go along with us on any future program that would be necessary to get our share of the business in Baltimore. The price class in Baltimore as of July is 5.1%.

At this particular point a decision had to be made since Schulte was going out of business and if Zell decided to do likewise, it would leave us with only one dealer in the city

of Baltimore, and not a very strong one at that. From our experience in the past year, I believe you will agree that it is rather difficult due to the uncertainty of the times to get a new dealer as large as Mr. Zell. I am sure that in losing Mr. Zell we would lose a great deal of prestige and very likely would not be able to get the facilities that Mr. Zell now has.

Mr. Zell was very serious in his conversation and said that we have never given him an opportunity to show us that his organization can maintain Packard price class, and he felt that he was at least entitled to this request, and if it could not be done, he would bow out graciously. This request has come up before from Mr. Zell, and it has been in his mind for a considerable length of time. I am very sure that he was most serious in his decision in relinquishing the Packard franchise.

This I agreed upon, and I am sure that I am correct. Under the circumstances, I agreed with Mr. Zell and Mr. Beck not to appoint another dealer in Baltimore for the present and, therefore, give Mr. Zell the opportunity to prove that he can do the job. Mr. Zell felt very pleased that we had given him this consideration, and just as soon as the Schulte dealer is terminated, he will build up his organization to fulfill all requirements. In making this decision he had in mind the possibility of a shortage of cars and also that our present agreement expires in March, 1952, and this too will give Mr. Zell a reasonable time to show us that he can do the job. Mr. Zell was very emphatic upon the agreement that we could go ahead and get another dealer if we felt it necessary.

However, the city of Baltimore seems to be in a slump, at least for Packard. The first ten days of this month shows that Mr. Zell delivered 3 cars, and the second, 2 cars; Web-

ster delivered 1 the first ten days and 3 the second ten days; and Schulte delivered 4 the first ten days and 2 the second ten days. Of course, Mr. Schulte is giving long trades to sell the balance of his new cars, but on the whole, Baltimore has not felt too much of an increase in business.

Both Mr. Webster and Mr. Zell said that they have not seen business so slow for a considerable length of time. However, both of these men claim that they have quite a few prospects ready to sign but just can't seem to get them to take their cars. They do feel, however, that just as soon as competition posts their new prices, Packard will get a considerable amount of new business.

Mr. Zell has 46 new cars on hand, and he agreed that his stock was not heavy. I advised him that it will be necessary for him to take approximately 30 or 40 more cars from us to start to fulfill the job that he will be responsible for in taking over the third dealer's share of the business. This he agreed to do. Just as soon as the Zone receives the dated cancellation of Mr. Schulte's agreement, a letter will be sent to him by Mr. Beck requesting his return of new material according to our Sales Agreement.

In reviewing Mr. Schulte' situation again, I find he is not doing Packard any good and that the quicker we divorce ourselves from this operation, the better off we will be. I understand that he had contacted every competitive make of dealer giving them the story that he is giving up Packard and trying to rent his building. Of course, he tries to justify his position in that he is giving up Packard and, therefore, his building is for rent. It is too bad that this came about because Mr. Schulte has nice buildings and facilities, but I believe we have no alternative, as much as I hate to lose any dealer today.

E. J. Platfoot

Defendants' Exhibit 20

[Letterhead of Schulte Motor Sales, Inc.]

December 14, 1951

Packard Motor Car Company
1242 24th Street, N. W.
Washington 7, D. C.

Dear Mr. Beck:

In reference to our conversation, the early part of this week, regarding cancellation of our Packard Franchise at both 3605 Wilkens Avenue and 4615 Edmondson Avenue, or if your records should show 6400 Frederick Road.

We would like to have this to become final as of the customary thirty day period from the above mentioned date of this letter.

I beg yours and the factory's cooperation and mercy in the complete return of my parts, plus any tools, signs and etc. that I may have pertaining to your franchise.

Since my association with you personally and your fellow workers, I must say that it has been a pleasure. I only hope that some day, I may return once again into the realm of your fine organization.

Yours very truly,

SCHULTE MOTOR SALES, INC.
WILLIAM ALBERT SCHULTE
President

Packard
Wash

Defendants' Exhibit 22

[Letterhead of Somerset Seafood Company]

Rec'd
Mar—1 1954
R. Abernethy
Vice President

February 26, 1954.

Mr. Roy Abernethy, Vice President,
Willys-Kaiser Company,
Toledo, Ohio.

My dear Roy: I know you will be surprised to receive this letter from me—I could not let your fine Television and address go by without telling you how much I enjoyed it, and how much better it was than any of the previous Autolite programs. The old Macauley Packard conservatism in the presentation, the absence of rash claims and the eye-appeal were commented on by some of my friends the next day.

Another reason why I am writing you, Roy, is to tell you that the part you played in the disenfranchisement of our company in Baltimore and its subsequent liquidation was due to those above you at the factory, and, that it was not due to your own free choice, is our honest belief. The documents so far produced bear out this statement.

Two weeks ago, Senator Phoebus from our county, and, probably the strongest senator in the Maryland Senate, asked me about the Webster Packard Case. His interest was aroused by the pending Motor Vehicle Law which is being sponsored by Senator Carter and Senator Mason Sheehan and which is patterned by the laws of Virginia, Oklahoma and Texas. I assured him that we all felt and believed that the top-brass at the factory were entirely responsible for what happened to us and that you and I grew

up in the Packard Ranks and were old Master Salesmen together for many years (Senator Sheehan requested briefs and data last summer of our case and the other Hudson cases pending in the Federal Courts in Baltimore).

After the automotive affairs of Webster Motor were liquidated last year, I purchased a small home in Salisbury where we now live. If you ever visit our section of the country, I hope you will come in to see us. In the meantime, Roy, I want to wish you the very best success in your important tasks ahead.

Sincerely yours,

Richard Webster

Note:

Pages 1088 - 1089 are on card 17.

Defendants' Exhibit 25B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

THE WEBSTER MOTOR CAR COMPANY and RICHARD C. WEBSTER, *Plaintiffs,* vs. ZELL MOTOR CAR COMPANY, et al., *Defendants.*	Civil Action No. 8152

ORDER

This cause coming on to be heard upon (1) the motion of the individual defendants to dismiss the action for lack of jurisdiction over their persons and to quash the summons, the service of summons, and the return of summons as to each of them, (2) the motion of the defendant Zell Motor Car Company to strike certain allegations and portions of the Complaint, and (3) the motion of the plaintiffs to extend time within which to answer interrogatories and to answer motion to strike parts of the Complaint and to quash service of summons and return, counsel for the respective parties were heard and it having been represented to the Court that there is now pending in the United States District Court for the District of Columbia a similar action in which the plaintiffs in the present action are plaintiffs and the Packard Motor Car Company and others are defendants which has been set for trial in said Court to begin May 9, 1955, it is thereupon this 29th day of April, 1955, by the United States District Court for the District of Maryland,

Filed 29th April 1955.

Defendants' Exhibit 25B

ORDERED that plaintiffs' motion for a continuance be and it is hereby granted and all proceedings in the present cause are hereby stayed and the present cause is hereby continued for the period from this Order until the expiration of two weeks immediately subsequent to the disposition in or by the trial court of said action pending in the District of Columbia (including, without limitation, by settlement, order, directed verdict or verdict of the jury), other than by a decision and order by said trial court that it lacks jurisdiction over said action, and provided further that upon the disposition, as above defined, of the said cause pending in Washington, D. C. the present cause shall be dismissed as to all defendants with prejudice.

Roszel C. Thomsen
U. S. District Judge

We consent

John Henry Lewin
Attorney for defendant Zell Motor Car Co. and for the individual defendants appearing specially.

Wm. J. Hughes, Jr.
Attorney for plaintiffs.

[Certified by Clerk of Court]

Defendants' Exhibit 25C

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE WEBSTER MOTOR CAR COMPANY, and RICHARD C. WEBSTER, *Plaintiffs,* vs. ZELL MOTOR CAR COMPANY, et al., *Defendants*	Civil Action No. 8152

MOTION TO VACATE OR MODIFY STAY ORDER OF APRIL 29, 1955

COME NOW the plaintiffs, by their attorneys, and move this court to vacate or modify the Stay Order of April 29, 1955 on the following grounds:

1. The order was hastily drawn by attorneys for plaintiffs and defendants in an effort to save the time of the Court by avoiding argument of plaintiffs' Motion to Stay this Court's proceedings pending the outcome of the District of Columbia suit.

2. Subsequently the attention of plaintiffs' attorneys has been drawn to the possibility that in the District of Columbia case this Court's order of April 29, 1955 might be interpreted by Packard Motor Car Company as a release of, or an agreement to release, a joint tort-feasor,—i.e. Zell Motor Car Company,—and in consequence a release of Packard itself. In drafting the order of April 29th counsel for both parties considered the possibility of such an interpretation and felt that it was non-existant. They had, of course, no intention of releasing or agreeing to release at any time Zell Motor Car Company in such a way

Defendants' Exhibit 25C

as to affect, let alone destroy, plaintiffs' cause of action against Packard Motor Car Company. As the record shows, the entire object of plaintiffs' attorneys in filing their motion and appearing before this court was to postpone any action in this court in order that they might be free to devote their entire energies to final preparation for the trial of the District of Columbia case scheduled to begin on May 9, 1955. However, further reflection and research of the authorities by plaintiffs' counsel promptly on their return to Washington on April 29th indicates that there is some possibility, at least, that such a defense might be advanced by Packard. It is desirable that all danger of such a result be removed. It is obvious that plaintiffs' obtaining without argument a stay of the Baltimore proceedings is not a matter of such importance as to induce or sustain an agreement which would or might accomplish the destruction of the entire cause of action against Packard. Insofar as this Court's order of April 29th is susceptible of such construction or result, its wording constitutes a pure and inadvertant mistake on the part of counsel.

3. Under these circumstances plaintiffs move this Court either (a) to vacate its order of April 29, 1955 in its entirety and allow argument before this court on plaintiffs' motion for a stay of proceedings in this court, or (b) to modify the order of April 29th by deleting the final clause beginning with the words "and provided further" and running to the end of the sentence.

DONALD D. WEBSTER
Donald D. Webster
Attorney for Plaintiffs

WM. J. HUGHES, JR.
WILLIAM J. HUGHES, JR.
Bowen Building
Washington, D.C.
Of Counsel

[Certified by Clerk of Court]

Defendants' Exhibit 25D

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE WEBSTER MOTOR CAR COMPANY, and RICHARD C. WEBSTER, *Plaintiffs,* vs. ZELL MOTOR CAR COMPANY, *et al,* *Defendants.*	Civil Action No. 8152

ORDER

This cause coming on to be heard on the Plaintiffs' "Motion to Vacate or Modify Stay Order of April 29, 1955", and Donald D. Webster and William J. Hughes, Jr., attorneys for the Plaintiffs, and John Henry Lewin and David C. Green, attorneys for Defendant Zell Motor Car Company and for the individual Defendants appearing specially, having all been heard in open Court, and this Court being persuaded that there is no sufficient reason to justify either the vacation or modification of its Order of the 29th of April, 1955, it is thereupon this 10th day of May, 1955, by the United States District Court for the District of Maryland, for the reasons given in the Court's oral statement made at the close of the hearing.

ORDERED that the Plaintiffs' "Motion to Vacate or Modify Stay Order of April 29, 1955" be and it is hereby denied in its entirety.

/s/ ROSZEL C. THOMSEN
U. S. District Judge

[Certified by Clerk of Court]

Defendants' Exhibit 25E

1

[Pretrial hearing, March 30, 1955]

* * *

18

Mr. Smith: I request that plaintiffs be required, in addition to stating each item of damage, to state the basis upon which plaintiffs determine the amount of each item of damages, including particularly loss of anticipated profits.

The Court: Are you willing to specify that,

19

gentlemen?

Mr. Leahy: I don't see how we can, your Honor.

The Court: I beg your pardon?

Mr. Leahy: I don't know what he means by "basis".

The Court: In other words, I suppose what he means is this. At least this is the way I interpret it.

Suppose you state value of franchise so and so much. How do you reach that amount?

It that what you mean?

Mr. Smith: Yes, how do you determine it.

The Court: What do you say about that, Mr. Leahy?

Mr. Leahy: Well, we could tell him that.

* * *

21

Mr. Smith: I request that plaintiffs be required to state whether plaintiffs will offer proof of the facts alleged in Paragraphs 23 to 47, inclusive, of the complaint under the heading, "Defendants' Pre-War Conspiracy to Restrain Interstate Commerce", and if so, on what issue the proof will be offered.

* * *

Defendants' Exhibit 25E

22

Mr. Leahy: This background evidence will be offered for the purpose of showing—shows first, the propensity of Packard and Zell to conspire, as alleged in our bill of complaint; secondly, because this evidence we produced and offered, if accepted, will show how the public is damaged and injured by the conspiracy, how the public can be damaged and interstate commerce restrained by the act and things done in the paragraphs alleged.

It will give a complete background picture which will be a full answer to what the defendant requested we should clarify and make more specific in so much of our statement on for pretrial conference in which he asked that we make more specific what damage there was in the monopolization and also in the restraint of interstate commerce under Paragraphs, I believe, 2 and 3 or 1 and 3.

The Court: The Court wishes to observe tentatively that since this is a civil action for damages and not a criminal prosecution the defendants' propensities would hardly be admissible in evidence, as the Court

23

views the case tentatively, to be sure.

The plaintiff claims to have been damaged by the specific conspiracy between Packard and Zell whereby Zell was given a monopoly of distributing Packard cars in the Baltimore area.

Therefore, I suggest that counsel give careful consideration between now and the trial to the question of whether any preceding conspiracies would be admissible.

Now, in a criminal prosecution for anti-trust violations the situation is a little different because there the Government can show a continuous conspiracy, but here the plaintiff is seeking damages caused by a specific conspiracy to eliminate him from distributing cars in the Baltimore area.

Defendants' Exhibit 25E

I am suggesting this without making a definitive ruling, of course, at this time for counsel's consideration.

* * *

24

The Court: Well, I am not going to rule now without hearing full argument, but I just suggest this to counsel for their own consideration and for their own planning of the trial.

* * *

Mr. Leahy: I think that it seems to me after we have submitted our itemization of damages in accordance with the defendants' request, that if he has any objections or any thing of that kind he ought to supply us with what objections he has.

The Court: I think so.

Mr. Leahy: So if we could have that. I think too——

25

The Court: I believe in doing everything that would narrow and pinpoint the issues, so to speak, and shorten the trial.

Mr. Smith: I would like to be more clear than I am now what is meant by "objections".

The Court: Well, if you claim that some particular item is not a recoverable item——

Mr. Smith. Oh.

The Court: —that you should so indicate.

* * *

Defendants' Exhibit 25F

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

THE WEBSTER MOTOR CAR COMPANY and RICHARD C. WEBSTER vs. ZELL MOTOR CAR COMPANY, SIDNEY ZELL, O. ENGLAR GILBERT, J. JACKSON SMITH, G. DALE PROCTOR, JOSEPH JANIN, individually and as agents of the ZELL MOTOR CAR COMPANY	Civil No. 8152.

Baltimore, Maryland
May 2, 1955.

The above-entitled matter came on for hearing before His Honor Roszel C. Thomsen at 3:30 o'clock p.m.

APPEARANCES

For the Plaintiff:

Mr. Donald D. Webster
Mr. William J. Hughes

For the Defendant:

Mr. John Henry Lewin
Mr. David C. Green

Defendants' Exhibit 25F

2

* * *

The Court: This is the case of The Webster Motor Car Company and Richard C. Webster, plaintiff, versus Zell Motor Car Company, et al, defendants, Civil Action No. 8152.

This matter was set for hearing last Friday on several motions filed by the different defendants and on certain exceptions to interrogatory, or answers to interrogatory. The matter was postponed from 10:00 a. m. until after lunch on Friday, and during the lunch hour the parties told me that they had been able to agree upon an order to be signed by the Court.

The parties went into Chambers and without a stenographer present, but after some brief discussion by all of the counsel present the Court entered an order—off the record. (Discussion off the record.) —the Court entered an order dated April 29, 1955.

Mr. Webster called me on the telephone yesterday, told me that on further examination of authorities he had become worried about the effect on the Washington proceedings of the order to which he had consented in this case, and would like to present a motion to vacate or modify the order of April 29, 1955. I told him that I could see him at

3

9:30 or 3:30 today, whichever was more convenient to Mr. Lewin. I was notified that 3:30 would be the proper time.

After a brief conference at the Bench it appears to the Court that it is desirable that all counsel present in the room last Friday make a statement of the situation as they understand it with respect to what happened in Chambers on

Friday and with respect to what has been done since, and with respect to their views on the effect of this order.

Mr. Webster: Your Honor, the motion before you is a motion to vacate or modify the stay order to which you have just referred, which was entered on April 29, 1955.

As background, I would like to say that when we came over here on Friday to argue our motion for an extension of time within which to respond to various motions of the defendant we were fully prepared to do so.

If we had lost every one, if our motion on an extension of time had not been granted it could have meant no more than that we would have been required to answer voluminous interrogatories which have been put to us by defenddant. It could have meant no more than that we would have had a certain portion of the complaint stricken, and it could have meant no more than that the summonses as to various of the individual defendants, I believe all of the individual de-

4

fendants, would have been quashed.

As I left the courtroom that morning, Colonel Hughes and Mr. Lewin and Mr. Green were seated in the little press room off to the side and they were discussing the possibility that since this case could not be heard before Your Honor until after 2:30, perhaps a way could be worked out to shorten the time for everyone. Parenthically, I would like to say, Your Honor, that this is—the matter of time is extremely important to us. We go to trial next Monday morning in a suit which has been pending for three years. Thousands and thousands of documents have come into that suit. It is a treble damage anti-trust action. Witnesses are summonsed from all over the country. We only have three attorneys: Colonel Hughes, Mr. Leahy, and myself.

We have been writing up to this morning a fifty-some page memorandum of law that Judge Holtzoff had asked

us to submit to him, and I have it here. I have given a copy to Mr. Lewin.

I wondered, frankly, why Mr. Lewin had not asked us, had not conferred with us at all. We would make, and will make to him available every document which has entered into that case in Washington. We will make available to him every deposition, and I thought that such willingness on our part would have at least answered his position he was taking,

5

that many of these witnesses might be out of the picture, or dead, if he didn't quickly have his discovery proceedings before that trial in Washington.

So when I sat down in the room with Colonel Hughes and Mr. Lewin and Mr. Green, neither of whom I had ever met before, but trying to find things out I understood immediately that the discussion was to the effect that perhaps a stipulation could be worked out, or an agreement where we would agree not to, or to drop this case against Zell if we had our day in court in the Washington suit.

I immediately said, and not on one occasion, but I would say on at least three, I am sure at least two, "Let it be understood that we can give no agreement of any kind to the Zell Motor Car Company, which Packard in the Washington suit, whether they could use it to dismiss us or not, which Packard in the Washington suit could point to and say in impeaching Zell's testimony when we call him as a hostile witness, he makes admissions against them, they could say, 'Yes, but you have made a deal with Zell and he is not an impartial witness as to Packard'."

Colonel Hughes, during that discussion, said, "Donald,"—I think words to this effect, "Donald, I think your fears are groundless because in my opinion this action in

Defendants' Exhibit 25F

Washington will be res judicata as to the action in Baltimore." I did not question his judgment on that. I

6

deferred to it. Mr. Lewin and Mr. Green said nothing.

On that basis, and on that basis alone, I was willing to go into, to have Colonel Hughes in behalf of my father enter into this order. The order would give the Zell Motor Car Company nothing more than it would receive if we have our trial on the merits over there, because then we couldn't bring this action over here. If Colonel Hughes' premise was correct, his conclusion was correct, and I did not question it.

The Court: You mean if his conclusion of law, or his belief in the law being that a decision in Washington on the merits would be res judicata of the action here.

Mr. Webster: That is correct, Your Honor.

Mr. Lewin: I didn't hear that. You say that is the law?

The Court: He said, assuming that Colonel Hughes' conclusion was correct. I am just trying to state what I understand him to mean by "Colonel Hughes' conclusion." I am not stating any law. I am just trying to see if I understand the premise upon which Mr. Webster acted.

Mr. Webster: We were to meet Mr. Lewin at his office and draft up an order which would have that effect. We discussed a possibility that it should be just an order that would be entered by Court rather than any kind of an agreement. That premise, that feeling was running throughout,

7

that there must be no agreement with the Zell Motor Car Company. When we went to Mr. Lewin's office he had various orders and stipulations drawn. Colonel Hughes dictated into one of his orders, part of this order which became the order of Court.

Defendants' Exhibit 25F

Now my reasons for feeling that we have made a mistake, a serious mistake which might prejudice either the merits, the decision on the merits in our Washington trial or be used by Packard against us in trying to gain a settlement advantage, compromise advantage are these:

First of all, if this action is not res judicata, this Washington action is not res judicata as to the Zell action in Baltimore, then Packard could argue, I do not say with what merit, they could argue that the release, that this order which is entered constitutes an agreement to release, a release or covenant not to sue.

In the District of Columbia, the McKenna case—it is McKenna against Austin, 134 F. 2d 659——

The Court: What is that?

Mr. Webster: 134 F. 2d 659. It is a case decided by a divided Court. Justices Rutledge and Vinson were in the majority and Justice Stephens who is now the Chief Judge in Washington was in the minority. Justices Rutledge and Vinson concluded that the release in question there could be looked behind to see what the intention of the parties was.

8

Justice Stephens took a much more academic view, and he said that you could not look behind the release to see what the intention of the parties was, that the release—it released one joint tort-feasor and would release them all.

Justices Rutledge and Vinson did say that there was no validity to the distinction between a covenant not to sue and a release.

Then in the American Law Institute Restatement on this matter of res judicata I found this.

The Court: Which book is it? Judgments?

Mr. Webster: This is the Tort, Your Honor, Section 884.

Defendants' Exhibit 25F

The Court: Torts 884?

Mr. Webster: Section 884 and this was part of what convinced me that this action over in Washington would not be res judicata. Under the general principles of res judicata a judgment against one of several persons claimed to be liable for a tort is not res judicata against any of the others as to any issues involved in the case except as against one on whose account or under whose control the action was defended.

Then skipping a few lines.

Likewise, a judgment in favor of an alleged tort-feasor or a finding for him on any issue in an action against him alone was not res judicata in a later action against

9

another person also claimed to be liable for the harm, unless the other controlled the defense of the first suit, or unless the sole basis of the other's liability was the act of the successful defendant.

Then in the Restatement of Judgments at Section 93, the general rule as to persons not parties or privies is stated thus: Except as stated in Sections 94 to 111, a person who is not a party or privy to an action in which a valid judgment, other than a judgment in rem is rendered cannot directly or collaterally attack the judgment and is not bound by or entitled to claim the benefits after an adjudication upon any matter decided in the action.

And Section 94 is this: Except as stated in Sections 96 to 99, a rendition of a judgment in an action against one of two or more persons liable for a tort, breach of contract, or other breach of duty does not effect the claim against the other.

Now, regardless of the merits of the argument which Packard could make against us in Washington, I was con-

vinced that neither Mr. Lewin or Colonel Hughes, nor Mr. Green, nor myself meant to do anything which would in any way, and I say in any way to include argument against us, which would in any way affect our cause of action against Packard in Washington.

We called Mr. Lewin immediately when we discovered

10

this. I think we called him on Saturday morning and asked him if we could come right over. He was not able to be with us on Saturday for obvious reasons, I mean for perfectly reasonable reasons.

We came over at his invitation, or he permitted us to come over on Sunday, and during our conversation with him on Sunday I was doubly despaired when he told us that he had notified Packard of what had happened over here on Friday.

I said to Mr. Lewin, "Mr. Lewin, you know that Colonel Hughes based his whole line of reasoning, and I too, on this action in Washington being res judicata. You know that we made a mistake." He said, in effect, "Well, you might have made a mistake, but I didn't."

Now I say to Your Honor, in closing, that while I know that we have an equitable plea to you to relieve us from the harassment of these proceedings that Mr. Lewin is now engaged in, especially when I say that we will make available to him everything that we have in the Packard case, I would still prefer to have you enter every one of his motions favorably to him and to release us from this. I might be wrong. I might be giving away a great deal more, but I do not want to be faced with that argument. I do not think that we should be, especially when we clearly made a mistake and were dealing what we thought in friendly fashion with

11

two members of the bar.

Defendants' Exhibit 25F

The Court: Well, I understand that you are formally making the proffer that if I do strike out or vacate these orders as you have suggested, that you are willing that each of the motions which you had asked to have postponed be decided against your client.

Mr. Webster: May I make one reservation on that, Your Honor, and I would certainly do so, but I'd like to be heard on just one thing and for just one minute.

There is one motion in there to strike out of the midst of our complaint, and Packard has been arguing this for three years, that the portion of the complaint that Mr. Lewin wants you to jump in and strike out, should be stricken. We have successfully persuaded Judge Holtzoff on each instance that Packard has made that argument that this early period is not relevant, that it is relevant.

With that one exception, dismissing the action as against the individual defendants and ordering us to go ahead and answer the interrogatories, we will do our best. We will certainly get them in as soon as we can.

We have answered a great many of them, in substance, for Packard and the offer still goes that we hold our entire case open to Mr. Lewin, including our depositions and these documents.

The Court: Well, you are making a very important

12

reservation in what you are willing to have me do, because there is no possible question that these individual witnesses were not properly served.

Mr. Webster: That is correct.

The Court: Anybody can tell that just by picking up the file and taking a look at it. You can serve them again, but that is a trifling matter. The important thing is whether the defendant shall have to defend matters which began before the war.

Defendants' Exhibit 25F

Mr. Lewin: 1925.

The Court: Whether he can have to come up to that. Now you have asked to have a delay in passing on that. That is one. Others deal with interregatories and I have forgotten what that point is now; the question of whether that part of your complaint should be stricken out on the merits is one on which I express no opinion. It seems to me to be a matter in which something can be said on both sides that I would be willing to hear, but you are not—it doesn't seem to me you are making any concession at all, when you withdraw that. That is the only concession that amounts to anything.

Mr. Webster: Then I don't want to be understood in that way. I suggest then that you strike that portion of the complaint.

The Court: Does Mr. Hughes want to say anything first?

13

Mr. Hughes: No, Your Honor, except I want to make perfectly clear that, after all, the entire object of approaching you on Friday was to avoid an argument and we certainly hadn't the remotest idea of having any effect on the Washington suit. I mean there is just no comparison between avoiding the difficulty on an argument before Your Honor and saving Your Honor's time and the complete dismissal, in effect, of the Washington suit. So the entire object of the proceeding before you was simply to get around the matter of the difficulty of the prospective proceedings in Baltimore here this week without any object of having any effect on the Washington suit as such.

I think that is perfectly clear and that is all I have to say.

Defendants' Exhibit 25F

Mr. Lewin: May it please the Court, I take the position that there is no just ground for vacating this contract and consent decree on any basis, either in law, in equity, in morals, in justice, or in common sense.

Now let me say a word about the background of this suit. The suit in Washington was instituted on February 16, 1953, against the Packard Motor Car Company and its satellites against the Zell Motor Company and its officers and employees. We were enbroiled in that suit for two months before we got any relief. We moved to quash the service and to dismiss for lack of jurisdiction over Zell in the District of Columbia.

14

That point was never argued. The plaintiff was dismissed, Zell and the Zell group from the case voluntarily.

Now any effect that that dismissal may have had on the Packard suit has taken place. That dismissal can certainly be used by Packard just as well as this dismissal can be used at anytime. That was a voluntary dismissal without contention.

The Court: Well, it was a dismissal without prejudice.

Mr. Lewin: It was a dismissal without prejudice.

The Court: This provides, with certain contingency, it would be a dismissal without prejudice.

Mr. Lewin: This would be a dismissal without prejudice under Rule 41, because the second dismissal is——

The Court: Well, the dismissal in Washington and dismissal here are entirely different breeds of cows.

Mr. Lewin: Well, not quite entirely different. I am trying to give you the equities and background of this picture. We were in this suit at great expense two months, at great expense, at great toil, at great loss to Zell's health, if we must talk about equities, because he and his wife nearly had breakdowns as a result of it.

Defendants' Exhibit 25F

We finally got out of that suit, and that was April 16, 1953, and we were properly lulled into a sense of security. We couldn't afford to follow that Washington suit

15

in detail and prepare for a possibility that we would be resued. So two years went by in which elaborate discovery was had in the Washington action of which we had no benefit whatever, and during that time we had lost contact with the case.

We have lost contact with the witnesses. Some of them may be dead for all I know, but we are being seriously prejudiced. The plaintiff waited until the very last day of the Statute of Limitations that they thought was applicable and instituted this suit, not because they want to sue Zell. They don't. They tell you that today. They told me yesterday they would give me a gentlemen's agreement that they would never press this suit against Zell, but I can't take a gentlemen's agreement. It isn't my suit. I certainly could take Mr. Leahy's and Mr. Hughes' gentlemen's agreement on my own suit, but I couldn't do that for Zell. They don't want to prosecute Zell.

I don't know why they brought the suit again, but they did. They filed it and they expected me to sit back on my haunches and let more time go under the bridge, but I knew I couldn't do that. I knew that I would have to follow the Washington suit and I knew I would have to follow it intelligently and I knew I couldn't do it without discovery. I had someone look at the Washington case and I found it didn't give me the kind of discovery I have to have in order

16

to prepare and I know I couldn't wait for a long trial in Washington before I activated my discovery, so I immediately proceeded to do so.

Defendants' Exhibit 25F

I filed the motions that your Honor knows about. Seventy pertinent interrogatories which they could speedily answer after two years of preparation and I gave notice to take the depositions of the officers beginning today and running tomorrow and Wednesday until completion. Now I had a real reason to do that and I had a real reason for consideration, it seems to me. Now this is what happened.

They didn't approach me at all until Thursday, and on Thursday Mr. Hughes called me up. He sought me. I didn't seek him, and he is the one that suggested the substance of that order, which your Honor signed yesterday, over the telephone Thursday morning April 28th, and I took it seriously and I said, "I will try to get Zell's agreement to it," and the suggestion of his was this: "We don't want to sue Zell. We are willing to let Zell out. We don't want to do anything that would hurt the Packard suit, but if you will postpone your discovery until a short time after the trial over here in the District of Columbia, we will consider giving you a dismissal which, of course, would be with prejudice." I said the word "with prejudice" and, of course, that was understood would be with prejudice in any event.

17

Now that was the substance of what we eventually agreed to on Thursday, on Friday morning, but all Thursday they had to deliberate about that and its legal consequences, if any, on the Packard suit.

They are three able lawyers. William Leahy is one of the best in Washington. Mr. Hughes is one of the writers of Hughes on Federal Jurisdiction and procedure. There is no question of their overlooking anything. They had the full day to consider it and so did I, and I took it in good faith and I prepared a stipulation which was a covenant not

to sue, but they were going to call me in about an hour. They didn't do it. Mr. Hughes was to call me in about an hour. He didn't call me, and eventually toward the end of the day I called him and I said, "What are we going to do about this," and he said, "Well, there is a disagreement among us over here and I'm afraid we can't go along with that idea. So we will meet you in Court tomorrow."

So I thought that was perfectly agreeable to me, and I was here at the call of the docket Friday morning and after Your Honor excused us until two o'clock I walked out of that door and I met Colonel Hughes and Mr. Webster, and Mr. Green was with me, and we went into a conference and they came back with this proposition, "Isn't there some way in which we can let Zell out? Of course, we don't want to hurt the Washington suit." Well, I said, "A covenant not to sue won't

18

hurt the Washington suit." "Well, we, some of us don't like the idea of a stipulation. Do you think you could get His Honor, the Court, to order this case dismissed?" and I said, "I don't know on what grounds he would subject himself to the jeopardy of the Fourth Circuit." I said, "Of course, you have got to consent to it or otherwise he is not going to do it. I can say I can go prepare the order tomorrow and I will, but as sure as shooting he is going to look up and say, 'Have you consented to this?' ", which is exactly what Your Honor did.

Well, they said, "Well, I hope he won't do that." Well, I said, "He will at least ask you if you have any objections to it and that is going to be the equivalent of it."

Another suggestion was that if we couldn't pull that off, I was to approach Packard and beg Packard not to use anything over here against them in the Washington action and I said, "Well, that is even more nonsensical. I

have no such influence as that off Packard. Those lawyers in Washington represent a client and they are going to do their duty."

The Court: That was discussed before you came to me?

Mr. Lewin: All of that. Every bit of it.

The Court: Let me get this clear, because I hadn't heard that at the Bench. Do counsel for the defendants dispute that you discussed the possible effect that Packard might make of this order before you came into my room?

19

Mr. Webster: Your Honor, that is the very subject, as I said we told Mr. Lewin that we wanted to do absolutely nothing which would effect that suit, and if that is what is meant by the question, if that is what it is directed to, yes, we did.

The Court: But he said that you asked him if he would agree not to—or to ask Packard not to use anything that was done here.

Mr. Webster: Your Honor, I emphatically deny that. I heard nothing of that.

Mr. Lewin: Well, Mr. Hughes will have to speak.

Mr. Hughes: I don't recall that at all.

Mr. Lewin: You don't recall saying to me, "Mr. Lewin, do you think you could persuade the Packard Company not to use this in this Court," and I said, "Oh, Mr. Hughes, that is almost a childish suggestion." Do you remember that?

Mr. Hughes: I don't recall that, Mr. Lewin. I'm sorry.

Mr. Lewin: Do you remember it, Mr. Green?

Mr. Green: Distinctly.

Mr. Lewin: Mr. Green distinctly remembers it, and at any rate I know it happened and I know there was the utmost deliberation about this.

Defendants' Exhibit 25F

Now let's discuss, if we may, for a moment what

20

happened then. I was deputized to go back to the office and draw up an order, draw up a number of drafts, and we will meet you at eleven o'clock to discuss them. I already had the stipulation drawn up and it was there. I drew up two others. One was a flat dismissal as of today, which I would infinitely prefer to have. The other was the order that was presented to Your Honor except that it wasn't as detailed, worked out as well, and Mr. Hughes and Mr. Webster came in and they participated with me in drawing the very order that was laid before Your Honor. I am responsible for certain phrases and they are responsible for certain phrases, and every suggestion that they made was adopted. That order is completely from stem to stern theirs.

There is just no question about it. They knew what it meant. They knew what it could do to this action and they knew what it would do to any other action and, of course, it is a covenant not to sue. That is what it is. It doesn't release anything. It doesn't release anything even in future. It promises that on a certain contingency they will dismiss this action. That is what it is. It is a covenant and it is a covenant approved by you after you asked us in your Chambers, and we are entitled to the truth, "Did we have any objection to it," and when you put this question to me I said, "I am in favor of it. This is agreeable to me," and Colonel Hughes said, "This is eminently agreeable

21

to me," and this gentleman sat, stood there and didn't open his mouth.

Mr. Webster: And Your Honor, certainly the very foundation of our disagreement was not then known to us. Mr. Lewin has not mentioned the res judicata principle and he sat there and——

Defendants' Exhibit 25F

Mr. Lewin: I will talk about the res judicata principle, because it hasn't a thing to do with this. Colonel Hughes thought that if there was a decision on the merits in Washington—this is what he told me he thought yesterday—that that would be res judicata of the suit over here and I said, "Well, Mr. Hughes, let's go back to first principles. It depends upon the parties and their privies, doesn't it?" I said, "A suit over there is binding upon the parties and their privies." I said, "Is Zell Motor Company a co-conspirator or an alleged co-conspirator, a privy?" I wouldn't have supposed so, but I said, "I'd like to go down to my office and check it," and I have checked it. Of course, it is not res judicata.

Now what bearing has that on this? None whatsoever. Mr. Webster advances the argument that that is important, because he didn't want to give Zell anything, that he was res judicata. He wouldn't be giving Zell anything.

Well, why didn't he want to give Zell anything. If he is entering into a contract, he was getting something from

22

Zell. He was getting a continuance of these proceedings that he wanted to have continued. Why didn't he want to give us some consideration for it? He says now that the only reason he was entering into it is because he didn't think he was giving Zell anything more than the law already gave him.

Well, now, the order itself negatives that, Your Honor, because the order goes beyond any disposition of that case that could possibly be res judicata.

Now listen to it. Ordered that plaintiff's motion for a continuance be and is hereby granted and all proceedings in the present cause are hereby stayed and the present cause is hereby continued for a period from this order until the

expiration of two weeks immediately subsequent to the disposition in and by the trial court, in or by the trial court of the said action pending in the District of Columbia, including without limitation by settlement order, directed verdict, or verdict of the jury.

Now how could a settlement be res judicata. It couldn't be res judicata on anything. It wouldn't be res judicata against Packard.

So the res judicata idea is something that they just suddenly thought up. It hasn't any bearing on that.

Mr. Webster: Do you say you didn't hear that very principle discussed in the conference?

Mr. Lewin: I heard it discussed yesterday.

23

Mr. Webster: Did you hear me discuss it out there? Mr. Green, did you?

Mr. Green: I remember you and Colonel Hughes mentioning it together, but no point was made of it with us and we didn't discuss it.

The Court: Mr. Lewin said that he was asked at the conference on Friday morning whether res judicata would be a defense and he said he wasn't sure.

Mr. Lewin: That was yesterday, Sunday, at my home where I didn't have the books. I had to say that my best legal hunch was that it wasn't res judicata. I don't see how joint tort-feasor could be in privy.

The Court: You say that at the conference which you had on Friday you heard the matter discussed between the two counsels for the plaintiff and you and Mr. Green sat mute and made no comment on it, but knew that they were acting under a certain assumption of law when they entered into the agreement, is that it?

Mr. Lewin: No, that is not it. I don't subscribe. Mr. Green said he heard them discussing res judicata. Now I say the res judicata hasn't anything to do with it, because this order——

The Court: Well, that is an argument. I am trying to get the facts, and the fact, as I understand it, is that they did discuss it, but that you all took me, that is on

24

your side, the counsel for Zell took no part in the discussion at all, but do you say that you knew when they—as I understand, you deny that the agreement was entered into with any understanding, with any knowledge on your part that they were acting upon a belief that the District proceedings would be res judicata?

Mr. Lewin: Yes, I deny that. When you ask me whether I overheard them use the word "res judicata" in their conversation is something I must say I can't tell you. Mr. Green suggests that I left and after I left the res judicata may have been mentioned. I don't remember it being mentioned, and it wouldn't have had any effect on me if it had been mentioned, because this order was to have a dismissal of our suit even if that case over there was settled. So res judicata didn't have anything to do with it at all, and, of course, I would have expected to be getting something under the order. If I thought that was res judicata and a settlement would preclude them from all times why would I have wanted that order?

The Court: Well, now, Mr. Lewin, was there any discussion among the parties as to what effect this order which was finally prepared might have on the Washington proceedings?

Mr. Lewin: Yes, there was this discussion. Mr. Webster said, "I am reluctant to sign anything. I would be

willing to give you this gentlemen's understanding, but I

25

don't want anything signed that Packard might use," and I said, "Well, I don't believe you are going to be able to get away with that. I don't think you are going to be able to convince the Court that he ought to dismiss this suit just because we have got some sort of a secret gentlemen's agreement that is not to be known to Packard." Now, that is what was mentioned.

The Court: Was there any understanding between you as to what would be the effect on this suit if the Washington suit were dismissed because you had entered into this agreement?

Mr. Lewin: No.

The Court: Was that discussed at all?

Mr. Lewin: That was not. The question of contributions between joint feasors, that is the point Your Honor must have in mind and that wasn't discussed.

I knew that this wasn't as good as I would like to get, but I knew that it was good consideration for what I was willing to do and I made it perfectly plain to them that I would not voluntarily postpone those discovery proceedings one day unless I got a covenant not to sue.

Now they didn't want to give it because they didn't want to raise up an argument in Packard's hands, but they remind me of the quotation from Macbeth, "Would not play false, but yet would wrongly win." They want it all the same and

26

they wanted it so that they eventual' came over to Your Honor's room and put their, Mr. Hughes put his name on it.

Now there was no over-reaching. There was no fraud. There was no inadvertence. At that time all parties thought

it was a covenant not to sue and all parties thought it couldn't affect the Packard case, and that is true today. That is absolutely the law today. This is a covenant not to sue.

The Court: You say that is true today. Do you mean that it will not affect it, or that all parties believed it would not affect it?

Mr. Lewin: No, it will not affect it. That is true today. No. This gentleman here has gotten some cold feet about it.

The Court: You are talking into the record. You mean Mr. Webster?

Mr. Lewin: Mr. Webster has gotten cold feet. He said he has read some authorities. I haven't seen them. He cited one to me over there Sunday at my house. He couldn't give me the citation, but he told me it was in the March edition of the advance sheets and it was a decision by the Second Circuit. I read it this morning. It is the case of a release in which under these circumstances even a release didn't discharge the joint tort-feasor. So, if anything, this authority is in his favor. The same thing is true of

the authority he cited to Your Honor a moment ago from the District of Columbia. There the majority of the Court, which establishes the law certainly, agreed that the release under those circumstances was not intended to release the other joint tort-feasor and didn't permit it to have that effect. So the two authorities he has consulted, the two authorities that has brought fear into his heart as to the effect of the covenant not to sue are both authorities in his favor.

The Court: Well, are you willing to agree on the record that the order which was signed, and to which you

consented on behalf of your client, was not intended to release the other joint tort-feasor?

Mr. Lewin: I had no intention about it one way or the other. I had no interest in it. I didn't care whether they were released or not. I have just as much love for Packard as I have for Webster, probably more, because they are lined up with me.

The Court: I am not talking about love. You have given evidently more careful thought to this matter than plaintiff's counsel gave before this order was presented. At the time it was presented was it your belief that this release was intended to release Packard? Did you sign it on behalf of your client with the belief that it would release Packard?

Mr. Lewin: No. I believed it would not, and I believe that today.

The Court: And it was so, that you did not

28

intend that it should release Packard?

Mr. Lewin: I had no intention one way or the other.

The Court: Well, if you believe it would not, you did not intend that it should.

Mr. Lewin: Well, it was none of my business. It was none of my business.

The Court: But you say you did believe and still believe that it would not release Packard?

Mr. Lewin: That is presently right.

The Court: And at the time you entered into it you did not believe it would release Packard?

Mr. Lewin: And I don't believe it today, and I think I can convince Your Honor that it won't, and this thing is a tempest in a teapot, as Mr. Hughes told me yesterday, because he doesn't believe it will either.

Defendants' Exhibit 25F

Now that is the situation. Here is a division of counsel. One, Mr. Webster is afraid of it because of these two authorities, both of which are in his favor, and Mr. Hughes has believed as I have believed all along that the covenant not to sue will not discharge the joint tort-feasor. Now that is the situation before Your Honor today.

Now let me cite you this.

Mr. Hughes: Excuse me. Are you all through?

Mr. Lewin: No, not quite. I want to cite His Honor some authorities as to the effect of a release, which

29

this is not. See Maryland Code, Article 50, Section 23, which is the governing law of this cause of action because here is where the cause of action arose. Now let me read that if I may.

The Court: That is the joint tort-feasor act?

Mr. Lewin: Yes, Your Honor. A release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasors unless the release so provides.

Well, now this isn't a release of a joint tort-feasor. It doesn't provide that it shall release Packard. Continuing:

But reduces the claim against the other tort-feasor in the amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.

Now Section 24 is the one that would give me some concern as to the right of contribution because it provides that a release in futuro will not protect you against contribution in the case of joint tort-feasors. It provides: A release by the injured person of one joint tort-feasor does not relieve him from liability to make contribution to another joint tort-feasor unless the release is given before the right of

the other tort-feasor to secure a money judgment for contribution has accrued and provides for a reduc-

30

tion to the extent of the pro rata share of the released tort-feasor of the injured person's damages recoverable against all other tort-feasors.

Now that "unless" clause is applicable unless the release is given before the right of the other tort-feasor to secure a money judgment.

The Court: Well, that does not protect you against your obligation to contribute to Packard?

Mr. Lewin: Well, I don't want to make an absolute admission because it is a collateral admission here, and I may have a dispute with Packard about it, but I think that is what this law indicates.

The Court: Well, I mean assuming it is a release and assuming it comes within the law and assuming that law applies, then that would be the construction I would place on it, uninstructed by the advice of counsel.

Mr. Lewin: And in the absence of any other authority I would do the same. I think if this is a release at all, or ever ripens into a release, it will take effect when they dismiss the suit with prejudice, and that will be after Packard's right to contribution has accrued, if it is ever going to accrue. Probably will. So I run some risk in doing what we have done. This isn't all one-sided, but I am perfectly sure that this isn't any release at all, and I am

31

perfectly sure that if it is, Section 23 protects them in the Packard suit.

Now I turn to the statement of the Restatement of Torts, Section 885. 885 says a valid release by one tort-feasor from liability from harm given by the injured per-

son discharges all others liable for the same harm unless the parties to the release agree that the release shall not discharge the others, and if the release is embodied in a document unless such agreement appears in the document, a covenant not to sue one tort-feasor for a harm does not discharge any other liable for the harm.

The Court: Well, now what effect do you think that has? If this is controlled by the Maryland law, the Maryland statute will apply, won't it?

Mr. Lewin: It certainly would.

The Court: You are offering this in case——

Mr. Lewin: This is a statement of what the law was in Maryland, what the general law is, or the weight of authority probably.

The Court: The Uniform Act doesn't apply in the District court case, but the District law is to be culled from the case of McKenna vs. Austin.

Mr. Lewin: All right. McKenna vs. Austin holds that a release of one joint tort-feasor does not release the other under the circumstances in which that release was given——

32

The Court: And whether or not, it depends upon the intention of the parties.

Mr. Lewin: Depends upon the intention of the parties and Your Honor well knows there was no intention of the parties to release Packard. I had no intention one way or the other, and my opponents on the other side had a very active intention not to release Packard, and there is certainly nobody, and certainly from the face of that instrument nobody could glean a hint that Packard was to be released as a result of it. On the contrary, the whole tenor of the paper presupposes that the suit against Packard will proceed, as it will proceed.

Defendants' Exhibit 25F

Now in Maryland, if you come back to the Maryland law again, on the covenant not to sue, even before the Uniform Statute I can cite to Your Honor Schriber against Carlton and Fulton Company an opinion by Judge Offut in 155 Md. 51, 1928, and there while he applies the rule as to releases, which is substantially like that stated in the restatement, and not the rule, the more strict rule as stated in the Statute on the covenant——

The Court: Was that a tort case or contract case?

Mr. Lewin: Well, that was a tort case, I think.

The Court: It was a tort case?

Mr. Lewin: Yes, I think it was. The Master vs. Biggs was later than the Schriber case, I believe.

33

I must apologize for this argument. This was hastily thrown together today. In 155 Md. 1928 it recognized the Horn book principle that we were always taught in the law school that there is this distinction between a release and a seal and a covenant not to sue and here Maryland is in line with that very principle.

Now, then, Your Honor may ask, is this order more like a release which wouldn't hurt them anyway, or is it more like a covenant not to sue which won't hurt. Well, I think it is purely like the latter. It is a promise to do something in the future on a certain contingency and for a certain consideration.

Now what legal ground or equitable ground can they appeal to Your Honor on. As a result of entering into something with their eyes open and their accomplished lawyers debated this thing, whether they should do it. They had these dreads and fears, yet overcame them. They still wanted that postponement so badly that they were willing to take the chance, if there was a chance. They came in Your Honor's Chambers, sat there. The one who spoke

for the group said, "Eminently satisfactory to me," and signed with a flourish. I suggested that all counsel sign and he said, "Oh, no, Mr. Lewin. One is enough. You sign for your side and I will sign for mine." The other one stood mum, his demeanor expressing great happiness that he was getting exactly what he

34

wanted.

What possible equity can there be now to permit them because Mr. Webster has made a mistake later. It was no mistake at the time. He believed it was a covenant not to sue and wouldn't affect the Packard suit, and that is true now. He thinks now he has made a mistake as to that principle on the authority of two cases with releases, both of them in his favor.

So we go to what Your Honor's power is, and that, I take it, is Rule 62, 60 or 62—60-B of the Rules of Civil Procedure, and that outlines what Your Honor's powers are with respect to setting aside an ordinary order. Now I say this is more than an ordinary order. This is a contract as well as an order.

So whether even the requirements of 60 would apply, I have considerable doubt because if Your Honor were to vacate this—of course, you might have authority over your own order, but I don't see what authority you have over our contract which we made for a valid consideration, but let's turn to the rule about Your Honor's powers even over a simple order. That reads—could you give it to me? I thought I copied it. I think I may have it. Yes.

On motion, and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following

35

reasons: Well, this is in terms of a final judgment, but I

suppose it would be certainly applicable, the same principles to an interlocutory one.

The following reasons:

1. Mistake, inadvertence, surprise, or excusable neglect.

2. Newly discovered evidence.

3. Fraud of the adverse party.

4. The judgment is void,

5. The judgment has been satisfied, released, or discharged.

6. Any other reason justifying relief from the operation of the judgment.

Now, I take it, except for that latter category, which I don't suppose——

The Court: It certainly is an omnium matter.

Mr. Lewin: The only possible ground, the only ground that is alleged here is mistake. Now, mistake of whom? In an ordinary contract, of course, it has got to be a bilateral mistake. I say there was no mistake on my part and that there was no mistake on Colonel Hughes' part, and there was no mistake on Mr. Webster's part at the time your Honor signed the order. Everybody thought it was a covenant not to sue. Everybody thought, and thought correctly

it couldn't affect the Packard case; but if it is anything, it is a unilateral mistake by one counsel out of a group of counsel for the same party.

Now here is the Eastern District of Wisconsin, Ridner, which makes two holdings which are applicable here as to Rule 60. One is that any discretion, there must be a sound discretion exercised by the Court and cannot be a capricious discretion, and is a controlled discretion. It has got to be on real ground and that discretion can be abused.

Defendants' Exhibit 25F

The other principle is that the kind of mistake alluded to there is mistake of fact. Now there is no mistake of fact or no inadvertence about any fact whatever in this case. As I say, the whole thing is a mistake of law made by one counsel after he got back to Washington and he began to wonder whether he made a mistake and he concluded that he had, but here we are all being able to satisfy him that he hadn't made any.

Now there is the authority under the rule, which says it has got to be a mistake of fact. There is no hint that there is any mistake of fact here, and the point as to res judicata I don't know whether I made myself plain or not, just washes up when you consider the terms of the order which was agreed to and which your Honor signed. That provides that this suit is going, is to be dismissed even if

37

that suit over there is settled.

Well, that certainly gave us more than we would get by a principle of res judicata, because if that case over there had been settled it would have been impossible for us to have used it in any way except as an offset to a judgment against us. We couldn't possibly have even advanced the idea of res judicata or estoppal or anything of the sort, and yet that is what this order does, this order that Mr. Webster agreed to and Mr. Hughes signed. It says that they will——

The Court: I have read it twice.

Mr. Lewin: All right. Then I think I need say no more, that the whole point about res judicata is just simply a red herring. It happens to be a debate between lawyers as to an academic question, Mr. Hughes thinking it is res judicata if you go to suit against two joint feasors, and I respectfully differ and I think the authorities are in my favor, but it doesn't affect this agreement one iota.

Defendants' Exhibit 25F

The Court: Mr. Green, do you want to say anything?

Mr. Green: Nothing particular, Your Honor. My recollection of the proceedings are substantially the same as Mr. Lewin's. I do remember statements made by Mr. Webster that they could agree to nothing that would in any wise jeopardized their suit there in Washington against Packard, and it was certainly on that basis that we drafted two different

38

forms of the order and finally re-drafted one of them, which have been, as Mr. Lewin said, largely dictated by Colonel Hughes, and I would emphasize when Mr. Hughes, Colonel Hughes and Mr. Webster left our offices about noon, the entire order had been agreed to in form as well as substance.

It had been typewritten up once and brought in and the three of us, Mr. Lewin had left by that time, the three of us, Colonel Hughes, Mr. Webster and I had gone over it carefully. Colonel Hughes in particular had suggested several innovations of the wording. Those had been agreed to, and they left then at about noon. Thereafter the order was typewritten in the form which they had agreed to.

They had then some two hours to consider, to mull over in their minds the exact form, substance, and effect of the order as it was finally presented to Your Honor that afternoon.

Only one other thing that seems to be a controverted point. I do remember at some point during the conversations, whether it was here in the press room, or in our offices, or in walking over here to the courtroom, but I do remember hearing some remarks between Colonel Hughes and Mr. Webster about res judicata. I don't remember the substance of them. I wasn't paying any attention to them. As I recall, they were not addressed to Mr. Lewin or to

me. We were giving no thought to the question. It seemed to be simply an aside between them,

39

to which, as I say, I paid no attention and so far as I recall Mr. Lewin paid no attention. Certainly no representations were made by either of us on that point. It simply to both of us, then and now, seemed quite irrelevant and we just assumed that it was counsel considering some little possibility by the way, and casting it aside; but other than that, my recollection of the transactions and of the dealings between counsel are substantially those as stated by Mr. Lewin.

The Court: Counsel for Webster want to say anything more?

Mr. Hughes: Your Honor, I submit that, after all, the entire intention of this approach to Mr. Lewin was simply to obtain a disposition of the Baltimore motions in order to enable us to prepare for our Washington case and under those circumstances, of course, there is quite obviously no quid pro quo involved in a complete and absolute dismissal of the Washington case by reason of any implication of law flowing from the Baltimore proceedings.

Now under those circumstances all we can do is to throw ourselves on the mercy of Your Honor and ask Your Honor to make that clear by a rescission of your Baltimore order.

Now, if necessary, we will proceed to give Mr. Lewin everything he wants. There has been no change in the situation. Mr. Lewin has lost nothing. His client hasn't been damaged in any way. If he wants to, he can immediately obtain these

40

interrogatories. He can take his depositions. He can do everything he wants.

Defendants' Exhibit 25F

So it seems to me that the application of Your Honor now is simply to get rid of a procedural difficulty which may arise in the Washington proceedings, as a result of Your Honor's order, and we simply ask Your Honor in the exercise of your discretion to eliminate any possibility of the case getting into such a shape that our entire case in Washington may be destroyed by these Baltimore proceedings.

Now that is what it boils down to."

The Court: Well, I think I am ready to decide in the matter now, and had better do it now.

The order was signed pursuant to an agreement of counsel. I think there was some consideration on both sides, and it is no part of my duty at this time to decide who gave or received the greater consideration.

I think I probably have jurisdiction to set aside the order, even though it is upon consent. I think when the parties come in and consent to an order that their agreement is probably subject to the control of the Court, but I don't think it is necessary for me to decide that matter now.

There are certain questions in this case which must be decided by the Judge in Washington. Never mind what my opinion may be. There are certain questions in that case which may come up before me or some other Judge of this Court

41

at a later time.

However, assuming my power to set aside the order as a consent order and the agreement which supported it. I find that the order was not entered into under any mistake of fact. I find that the order was not passed pursuant to any agreement which was induced by any such mistake as would justify me in setting aside the order. I find no fraud was exercised by either party.

Defendants' Exhibit 25F

I am firmly of the opinion that all counsel believed that the order would not release Packard. Now I don't know that I have any power at this time to make a finding which would be binding on the Washington Court, but I will make this statement, which I will testify to in the Washington Court, or on a deposition to be sent there, or by certificate, or by any way which the parties wish, and which the parties can use as the basis of a stipulation in the Washington Court if they care to do so.

It was my understanding when the order was presented that not only was there no intention of the parties that the agreement or order should release Packard, but it was my understanding, confirmed by what I have heard here today, that the parties; that is, the counsel for the respective parties all intended that the agreement and order should not release Packard.

I will so testify, or certify, in any way that would

42

be helpful to the Court in Washington, if either party wishes to have my understanding brought before the Court in Washington.

With that statement and that opinion I overrule plaintiff's motion.

* * *

43

I certify that the foregoing is a true and correct transcript of the proceedings in the above case.

/s/ BERNARD C. DALEY
Official Reporter.

Defendants' Exhibit 26

PACKARD'S COMPETITIVE PERFORMANCE
IN PACKARD'S PRICE CLASS
1950 - 1953

	Year	Registrations Packard	Registrations Price Class	Packard % of Price Class
UNITED STATES	1950	73,155	1,605,082	4.56
	1951	66,999	1,289,288	5.20
	1952	66,346	802,636	8.27
	1953	71,079	935,172	7.60
BALTIMORE ZONE OF INFLUENCE*	1950	537	10,942	4.91
	1951	466	8,781	5.31
	1952	475	5,952	7.98
	1953	522	6,439	8.11

* Baltimore City, Baltimore County and Howard County

RATIO OF BALTIMORE TO UNITED STATES IN PACKARD % OF PRICE CLASS

1950	1951	1952	1953
108	102	96	107

Defendants' Exhibit 30

[Letterhead of Will Scott, Inc.]

March 9th, 1950.

Packard Motor Car Company
1424—24th Street, N. W.
Washington 7, D. C.

Attention Mr. Samuel D. Braden.

Gentlemen:

This letter will serve as formal notification to you that this Company will terminate on March 31st, 1950, the Standard Dealer's Sales Agreement dated June 16th, 1949, between Packard Motor Car Company and Will Scott, Inc. in accordance with the provisions of Paragraph 17 of the said Agreement.

Very truly yours,

WILL-SCOTT, INC.

BY WILLIAM M. SCOTT
President.

Packard
Wash

Defendants' Exhibit 31

DEALER CONTACT REPORT

Zone Washington, D. C.

Dealer The Webster Motor Car Co., Quota 175 Date of Contact 7/21/50

Persons Attending Conference and Titles:

D Webster
H French Mgr.

	MO. (June)	Year-to-Date
Price Class as of April	7.4 %	6.0 %
Net Profit (Loss)	$ 2,460	$ 2,623
Owner's Salary	$ 750	$ 4,625
Working Capital Deficiency	XXX	$ NONE
Absorption	52.3 %	46.6 %

Recommendations Made to Dealer: Dealer at the present time is reflecting very inaccurate low gross profit on new cars by depreciating used cars at the time of new car sale to an absolute minimum inventory valuation. This is reflected in an excessive new car overallowance. Consequently when the used car is sold this overallowance is picked up with a resultant high gross profit on sales of used cars. He is also using 25% adjustment figure on his used car inventory which further tends to distort his used car operation.

Our recommendations to the dealer were that in order to present a true and accurate picture of his new car operation his overallowance should reflect actual overallowances and his used car valuation be based on our 20% reserve figure. In that their reconditioning, body & paint

shop has now been moved across the street from the main building it is also further recommended that a separate internal order system be installed for this particular department.

Although they were able to show $1,490 profit it required considerable analyzation of the records to disclose this fact. The importance of the daily operating record, in order to have this information on hand at all times, was discussed.

Commitments Received from Dealer: Analysis of present method of handling overallowances and inventory valuation of used cars to be considered in line with our recommendations.

Agreed to installation of subsidiary control of reconditioning, body & paint shop.

Agreed to install daily operating record.

* * *

Remarks: Dealer is now moved into new building which we know will permit more customer labor and increase in absorption should be evident in next 60 days. Attitude of dealer and general manager very good and they are extremely optimistic over the possibilities of the new model.

Alec Denholm
Zone Business Manager

July 27 1950
S. W. Wasil
Please note and return

Defendants' Exhibit 31

DEALER CONTACT REPORT

ZONE Washington, D. C.

Dealer Webster Mtr. Car Co. Quota 175 Date of Contact April 20 & 21, 1950

Persons Attending Conference and Titles:

Mr. Webster	Owner
Mr. French	Manager.

	Mo. MARCH	Year-to-date
Price Class as of FEB	3.3 %	3.3 %
Net Profit (Loss)	$ 268.00	$ 1,444.00
Owner's Salary	$ 812.00	$ 2,312.00
Working Capital Deficiency	X X X	$ —
Absorption	54.2 %	46.0 %

Recommendations Made to Dealer: Although dealer is still very seriously handicapped by lack of service facilities, which were burned out and are now being remodeled, plans should be made to deliver a minimum of 175 new cars and 225 used cars.

Analysis of used car inventory revealed lack of popular models in right price bracket with result that present inventory if composed of 50% being over thirty-days old. With present variable net profit per car, dealer is in position to revise trading policy and obtain greater share of price class.

* * *

Alec Denholm
Zone Business Manager.

Defendants' Exhibit 37

[Zell's 1949-1950 agreement]

PACKARD DEALER'S SALES AGREEMENT

* * *

METROPOLITAN DEALER

12. Joint exclusive selling rights (subject to provisions of paragraph 20 hereof) with other Packard Dealers and any Zone Office retail department situated within the area designated by the Zone Office as the Baltimore Metropolitan Area and which is described as Baltimore City, and Baltimore County, south of the 39° 30′ meridian line, and non-exclusive selling rights within the area known as Washington Zone, and Non-exclusive selling rights within the Continental United States of America, except within the limits of other cities, towns or areas assigned exclusively to other Packard Dealers.

* * *

DEALER'S ZONE OF INFLUENCE

14. Dealer's Zone of Influence, as covered in "Definitions of Terms Used" herein, is designated as follows:

Names of Complete Counties Included in the Dealer's Zone of Influence.	Names of all Post Office Communities and Their Counties Where Only Part of a County is in the Dealer's Zone of Influence
Baltimore City	
Baltimore County	

Zone Office may alter the foregoing designation at any time by written notice to Dealer, with the exception of any area in which Dealer is granted exclusive selling rights, and such notice shall become an amendment to this Agreement paragraph and shall be effective on and after the effective date established by Zone Office in said notice.

Defendants' Exhibit 37

DEALER'S DELIVERY QUOTA

15. Dealer's Delivery Quota, as covered in "Definitions of Terms Used" herein, is 450. Zone Office may alter this Dealer's delivery quota at any time by written notice to Dealer, and such notice shall become an amendment to this Agreement paragraph from date of mailing thereof by Zone Office.

* * *

BUILDING (Existing Location)

49. Building located at (give address, number of front feet on street or streets and depth where building has front on only one street; describe location generally and with reference to competitive Dealers).

11 E. Mt. Royal Avenue. Main building front 100', depth 100'. Used car and new car conditioning building front 50', depth 70'. Service building front 100', depth 100'. Located 1 block from Buick, 8 from Cadillac, 1 from Oldsmobile, 2 from Chrysler. Adjacent to business and residential sections. Area is center of automobile section of city. Convenient for customers.

* * *

NET WORKING CAPITAL REQUIREMENT

69. Dealer will maintain net working capital (fill in A or B below)

A. Exclusively for the sale and service of Packard products

B. Only for the sale and service of Packard products and (name and description of other business) None

in accordance with formula for computation as recommended from time to time by Manufacturer. At the time of execution of this Agreement, Manufacturer's present formula provides specification of Dealer's working capital requirements as follows:

(a) Minimum and base amount		$150.00	$ 6,000.00
(b) (Plus) (60% of Dealer's Delivery Quota)	450	× ~~$200.00~~ =	67,500.00
(c) Dealer's present Requirement for net working capital			$73,500.00

* * *

1952-1953

AMENDMENT TO PACKARD DEALER'S SALES AGREEMENT

* * *

4. Paragraph 10 shall read: "'Dealer's Delivery Quota' is the number of units which the Zone Office estimates to be the reasonable annual total sales potential of Packard Cars by Dealer. This quota is not an order by Dealer, nor an agreement to sell by Zone Office, but is established for the purpose of determining working capital and facilities required by Dealer in performance of this Agreement. It is specifically agreed that Zone Office will not be obligated to accept orders for Packard Cars from Dealer or to allocate or furnish Packard Cars to Dealer in any specified number regardless of Dealer's Delivery Quota or any other consideration."

* * *

Defendants' Exhibit 37

32. Paragraphs of Said Agreement requiring filling-in of blank spaces for Dealer's individual circumstances are hereby restated (with amendments thereto if any) so that blanks are filled in as follows (paragraph numbers correspond to those of Said Agreement):

* * *

METROPOLITAN DEALER

Pgh. 12. Metropolitan Area consisting of the city of Baltimore, Baltimore County, and Howard County.

* * *

DEALER'S ZONE OF INFLUENCE

Pgh. 14. Names of Complete Counties Included in the Dealer's Zone of Influence.	Names of All Post Office Communities and Their Counties Where Only Part of a County is in the Dealer's Zone of Influence.
Baltimore County	
Howard County	

* * *

DELIVERY QUOTA

Pgh. 15. 710 (Seven Hundred and Ten)

* * *

BUILDING (EXISTING LOCATION)

Pgh. 49. Building located at (give address, number of front feet on street or streets and depth where building has front on only one street; describe location generally and with reference to competitive Dealers).

Defendants' Exhibit 37

11 E. Mt. Royal Avenue. Main building front 100′ — depth 100′. Used car and new car conditioning building front 50′, depth 70′. Service building front 100′—depth 100′. Located 1 block from Buick, 8 from Cadillac, 1 from Oldsmobile, 2 from Chrysler. Adjacent to business and residential sections. Area in center of automobile section of city. Convenient for customers.

BUILDING AND LAND (EXISTING) AREAS

Pgh. 50. Area of Building 70,000 square feet, area of Showroom 2,000 square feet, area of Parts and Accessories Department 1,500 square feet, area of Service Department 04,500 square feet and 45 No. Work Stalls, area of Customer Parking Lot 3,000 square feet, area of Used Car Department 2,000 sq. ft. inside and or Used inside storage

* * *

WORKING CAPITAL

Pgh. 69. At the time of execution of this Amendment, Manufacturer's present formula provides specification of Dealer's working capital requirement as follows:

(a) Minimum and base amount.....			$10,000.00
(b) (Plus)	426	× $200.00 =	85,200.00
(60% of Dealer's Delivery Quota).			
(c) Dealer's present Requirement for net working capital			$95,200.00

* * *

Note:

Pages 1141 - 3 are on card 16.
Page 1144 is on card 17.

Defendants' Exhibit 44

May 29, 1952

Mr. John A. Dunphy
23 Sipple Avenue
Baltimore, Maryland

Received
Jun 4 1952
Customer
Relations Dept.

Dear Mr. Dunphy:

Our Detroit Office has forwarded your letter to us for the consideration it deserves.

We have written to your dealer, Webster Motor Company, requesting that they contact you immediately. We are confident that they will handle your complaint strictly on its merits and in line with the manufacturer's warranty. If you should not hear from your dealer by June 6, 1952, we would appreciate your notifying this office. In the meantime, you may rest assured that we are keeping this matter open on our records until we are confident it has been handled to a definite conclusion.

Very truly yours,

D. P. CRANE
Asst. Zone Parts & Service Mgr.

CC: R. S. Johnston ✓
J. A. Carr
R. G. Funk
C. M. Porter
S. N. Howell
Webster Motor Co.

Defendants' Exhibit 45

May 29, 1952

Received
Jun 4 1952
Customer
Relations Dept.

Mr. H. L. French, Jr.
The Webster Motor Car Co.
4410 York Road
Baltimore, Maryland

Dear Mr. French:

We are in receipt of a complaint registered with us by your owner, John A. Dunphy, (W-1193).

We suggest that you contact this owner as soon as possible and handle strictly on the basis of its merits.

A copy of our reply to your owner is attached. We will appreciate your cooperation in having the concluding report in our office by June 6, 1952.

Very truly yours,

D. P. CRANE
Asst. Zone Parts & Service Mgr.

CC: R. S. Johnston
J. A. Carr
S. N. Howell
R. G. Funk
C. M. Porter

Defendants' Exhibit 48

To THOSE LISTED

From M. G. BECK

December 27, 1951

D. P. Crane
E. R. Hale
S. N. Howell
R. G. Funk
B. F. Marnocha
F. C. Oldenburg
C. M. Porter
G. R. Wilson

IMPORTANT

We have in our possession an "Agreement of Mutual Cancellation" of the Packard Dealer's Sales Agreement from Schulte Motor Sales, Inc., of Baltimore, Md., effective January 11, 1952.

Will you please see to it that all programs for this dealership are cancelled so that there will be no charges after this date. Any charges to this dealership which occur because of improper handling will, of necessity, have to be borne by your department.

Let's make certain that all back orders are cancelled.
Your usual fine cooperation will be very much appreciated

MGB

Defendants' Exhibit 49

DEALER SALES AGREEMENT TERMINATION NOTICE

ZONE WASHINGTON DATE JANUARY 3, 1952

Dealer Name SCHULTE MOTOR SALES, INC.

Address 3005 WILKENS AVENUE & 6400 Frederick Road

City & State BALTIMORE, MARYLAND

Code Number 801

PLEASE CANCEL SHIPMENT ON OR AFTER DATE SHOWN BELOW OF ANY EXISTING PARTS AND OR ACCESSORY ORDERS HOLDING AT THE FACTORY FOR THE ABOVE DEALER WHOSE SALES AGREEMENT IS BEING TERMINATED ON JANUARY 11, 1952 (DATE TERMINATION BECOMES EFFECTIVE).

EXCEPT FOR ORDERS LISTED ON THE REVERSE SIDE HEREOF.

IT IS UNDERSTOOD THAT THIS ZONE WILL ISSUE NO FUTURE ORDERS FOR DIRECT SHIPMENT TO THIS DEALER.

* * *

Copies to:

Factory Warehouse (2)
Central Inventory Control
Factory Claims Department
Zone Warehouse
Zone Office Manager
Zone Manager

SIGNED E. R. HALE
(Zone Office Manager)

SIGNED .....
(Zone Warehouse Manager)

Defendants' Exhibit 50

File: Schulte

January 3, 1952

Mr. M. J. Ulaga
Service Promotion Manager
Packard Motor Car Co.
Detroit, Mich.

Dear Max:

We have been advised by the Sales Department that they have in their possession an "Agreement of Mutual Cancellation" of the Packard Dealer's Sales Agreement from Schulte Motor Sales, Inc., of Baltimore, Md., effective January 11, 1952.

Will you please advise all departments that all programs for this dealership are to be cancelled and there shall be no charges made after this date.

We would like to make certain that all programs be cancelled as any further expense would, of course, have to be borne by this office.

Very truly yours,

PACKARD MOTOR CAR CO.
S. N. HOWELL
Zone Parts and Service Manager

Approved by

.....
M. G. Beck, Zone Manager

CC: Mr. J. A. Carr
Mr. J. K. Williams
Mr. M. G. Beck
Mr. E. R. Hale
Mr. F. C. Oldenburg

Defendants' Exhibit 51

COPY

DEP'T HEADS, DIST. MGRS., & SERVICE REPS.

March 26, 1952

Subject, "Dealer Change Notice #6"

M. G. Beck
To
H. P. Cherry
D. P. Crane
R. G. Funk
E. R. Hale
S. N. Howell
B. F. Marnocha
B. B. Mitchell
F. C. Oldenburg
C. M. Porter
J. C. Stuart, Jr.
G. R. Wilson
G. H. Yeager

. . . . . .

Mail Desk

IMPORTANT

This is to advise you that the Packard Dealer's Sales Agreement for our dealer, DeBaugh Motors, in Towson, Maryland, which expires on March 31, 1952, will not be renewed for the year 1952-53.

Please see that all programs, etc., for this dealer are canceled effective as of that date.

Your usual fine cooperation will be very much appreciated.

M. G. Beck
Zone Manager

Defendants' Exhibit 55

DEALER SALES AGREEMENT
TERMINATION NOTICE

ZONE WASHINGTON DATE MARCH 26, 1952

Dealer Name DEBAUGH MOTORS
Address 103. E. PENNA. AVENUE
City & State TOWSON, MARYLAND
Code Number 66

PLEASE CANCEL SHIPMENT ON OR AFTER DATE SHOWN BELOW OF ANY EXISTING PARTS AND/OR ACCESSORY ORDERS HOLDING AT THE FACTORY FOR THE ABOVE DEALER WHOSE SALES AGREEMENT IS BEING TERMINATED ON MARCH 31, 1952 (DATE TERMINATION BECOMES EFFECTIVE).

EXCEPT FOR ORDERS LISTED ON THE REVERSE SIDE HEREOF.

IT IS UNDERSTOOD THAT THIS ZONE WILL ISSUE NO FUTURE ORDERS FOR DIRECT SHIPMENT TO THIS DEALER.

* * *

Copies to:

Factory Warehouse (2)
Central Inventory Control
Factory Claims Department
Zone Warehouse
Zone Manager
Zone Office Manager

SIGNED E. R. HALE
(Zone Office Manager)

SIGNED FRED OLDENBURG
(Zone Warehouse Manager)

Defendants' Exhibit 56

COPY

June 17, 1952

Subject, "Dealer Change Notice #10"

To THOSE LISTED
From M. G. Beck
COPY TO
D. P. Crane
H. P. Cherry
A. G. Fox
R. G. Funk
E. R. Hale
S. N. Howell
B. H. Marnocha
B. B. Mitchell
F. C. Oldenburg
C. M. Porter
J. C. Stuart, Jr.
G. R. Wilson
G. H. Yeager
.....
Mail Desk

IMPORTANT

This is to advise you that the Packard Dealer's Sales Agreement for The Webster Motor Car Company in Baltimore, Md., was terminated on June 11, 1952. Please see that all programs, etc., for this dealer are canceled immediately.

We also wish to advise you that our dealer, Winchester, Incorporated, in Alexandria, Va., has moved from 2008 Duke Street to:

1810 King Street — Alexandria, Va.

Please change your records accordingly!

M. G. Beck
Zone Manager

Defendants' Exhibit 59

DEALER SALES AGREEMENT TERMINATION NOTICE

ZONE WASHINGTON DATE JUNE 17, 1952

Dealer Name THE WEBSTER MOTOR CAR COMPANY
Address 4410 YORK ROAD
City & State BALTIMORE, MARYLAND
Code Number 802

PLEASE CANCEL SHIPMENT ON OR AFTER DATE SHOWN BELOW OF ANY EXISTING PARTS AND OR ACCESSORY ORDERS HOLDING AT THE FACTORY FOR THE ABOVE DEALER WHOSE SALES AGREEMENT IS BEING TERMINATED ON JUNE 11, 1952 (DATE TERMINATION BECOMES EFFECTIVE).

EXCEPT FOR ORDERS LISTED ON THE REVERSE SIDE HEREOF.

IT IS UNDERSTOOD THAT THIS ZONE WILL ISSUE NO FUTURE ORDERS FOR DIRECT SHIPMENT TO THIS DEALER.

* * *

Copies to:

Factory Warehouse (2)
Central Inventory Control
Factory Claims Department
Zone Warehouse
Zone Office Manager
Zone Manager

SIGNED E. R. HALE
(Zone Office Manager)

SIGNED F. C. OLDENBURG
(Zone Warehouse Manager)

Defendants' Exhibit 60

Baltimore - Webster

June 18, 1952

Mr. M J. Ulaga
Service Promotion Manager
Packard Motor Car Company
1580 East Grand Boulevard; Box 117
Detroit 32, Michigan

Dear Max:

This is to advise you that the Packard Dealer Sales Agreement for the Webster Motor Company, Baltimore, Maryland was terminated on June 11, 1952. This information was received from our Sales Department in "Dealer Change Notice # 10" dated June 17, 1952 signed by Mr. M. G. Beck, Zone Manager.

We quote the "Dealer Change Notice # 10" as received below:

> "This is to advise you that the Packard Dealer's Sales Agreement for The Webster Motor Car Company" in Baltimore Md., was terminated on June 11, 1952. Please see that all programs, etc., for this dealer are canceled immediately."

(signed) M. G. Beck
M. G. Beck
Zone Manager

Defendants' Exhibit 60

Will you please see that all programs, etc. for this dealer are canceled immediately.

Yours very truly,

S. N. Howell
Zone Parts and Service Manager

Mr. F. C. Oldenburg
Mr. C. M. Porter
Mr. R. G. Funk

cc: Mr. M. G. Beck
Mr. J. A. Carr
Mr. E. R. Hale

Defendants' Exhibit 62A

DATA RESPECTING EASTERN DEALERS HAVING SALES POTENTIAL AND PERFORMANCE COMPARABLE TO WEBSTER.

1950

Location	Annual Sales Potential	New Unit Sales		Variable Gross Profit		Fixed Expense		Operating Profit	Net Profit	Officers' & Owners' Salaries	Total Sales (All Depts.)
		Packard	Other	Amount	Per New Unit Sold	Amount	% to Total Sales				
Allentown, Pa.	180	125		$ 73,462	$588	$ 61,167	9.7%	$13,942	$10,140	$10,800	$ 633,037
Cleveland, Ohio	235	104		59,961	577	57,105	13.8	6,964	9,124	24,307	413,775
Elizabeth, N.J.	175	133		72,435	545	59,656	9.1	11,469	8,996	5,850	652,308
Erie, Pa.	204	140		89,145	637	61,783	8.8	15,819	15,379	7,811	699,603
Hempstead, N.Y.	300	144	157	125,362	416	104,273	11.2	22,719	18,857	2,400	929,947
Johnstown, Pa.	150	140		77,885	556	134,889	12.6	17,944	15,971	34,900	1,070,183
Kingston, Pa.	204	131		81,710	624	99,260	16.7	6,166	2,757	25,200	594,036
Mt. Lebanon, Pa.	180	100		56,428	564	56,818	11.5	17,674	22,974	6,000	496,016
North Philadelphia, Pa.	180	130		60,072	462	59,809	10.5	12,492	11,585	4,772	567,478
Philadelphia, Pa. - Frankford	180	108		46,953	435	44,096	10.3	12,317	13,338	5,200	429,856
Reading, Pa.	200	150		93,675	625	75,477	11.1	19,304	15,173	29,168	677,531
Scranton, Pa.	156	106		65,956	622	101,557	18.1	14,957	1,434	28,800	559,957
Troy, N.Y.	150	117	35	73,300	482	41,519	4.1	7,944	5,934	5,200	1,013,057
Upper Darby, Pa.	200	133		81,073	610	53,024	8.5	24,428	28,850	6,792	626,801
Waterbury, Conn.	150	126		70,104	556	66,491	10.5	18,650	13,704	7,425	632,384
Wilmington, Del.	250	112	16	95,372	745	80,459	11.3	18,351	19,486	12,000	710,615
Yonkers, N.Y.	160	120		$ 55,935	$466	$ 42,936	9.6%	$18,505	$16,767	$ 7,020	$ 445,814
Average					$550						
Baltimore-Webster	175	125		$75,498	$604	$81,997	13.8%	$5,846	$8,961	$9,350	$592,315

Defendants' Exhibit 62B

DATA RESPECTING EASTERN DEALERS HAVING SALES POTENTIAL AND PERFORMANCE COMPARABLE TO WEBSTER.

1951

Location	Annual Sales Potential	New Unit Sales		Variable Gross Profit		Fixed Expense		Operating Profit	Net Profit	Officers' & Owners' Salaries	Total Sales (All Depts.)
		Packard	Other	Amount	Per New Unit Sold	Amount	% to Total Sales				
Allentown, Pa.	180	92		$ 61,265	$666	$ 63,190	11.1%	$ 7,768	$ 4,264	$10,800	$ 568,334
Brooklyn, N.Y. - Flatbush	175	120	49	74,780	442	102,473	13.2	15,373	9,465	18,649	777,137
Cleveland, Ohio	188	90		62,397	692	53,966	12.2	13,808	13,074	21,825	440,727
Elizabeth, N.J.	175	132		81,902	620	63,333	8.9	12,257	9,554	5,663	715,380
Erie, Pa.	204	125		84,209	674	72,396	9.3	8,732	3,384	9,137	778,875
Flushing, N.Y.	190	115		64,381	560	50,061	8.5	15,951	10,611	8,210	585,819
Hempstead, N.Y.	300	114	197	113,007	363	140,115	11.7	7,464	3,693	10,300	1,192,570
Jackson Heights & L.I.C., N.Y.	301	136		104,299	767	102,090	13.3	8,592	7,353	10,245	769,216
Johnstown, Pa.	150	115	7	76,105	624	148,136	13.8	449	2,259	37,800	1,072,829
Kingston, Pa.	204	98		72,085	736	97,819	16.6	16,539	13,473	25,200	589,702
Lancaster, Pa.	200	136		66,647	490	67,990	6.3	25,999	20,361	-o-	1,077,498
Mt. Lebanon, Pa.	180	106		73,711	695	61,736	9.5	32,622	37,631	6,765	651,321
North Philadelphia, Pa.	180	138		70,476	511	70,067	10.1	6,964	4,797	5,300	694,531
Philadelphia, Pa. - Frankford	180	80		39,497	495	45,415	11.1	6,782	6,570	5,200	409,684
Philadelphia, Pa. - Germantown	200	108		75,754	701	95,977	14.4	8,857	9,663	12,000	668,509
Reading, Pa.	200	140		108,932	778	95,248	10.5	17,997	15,276	15,966	905,181
Richmond, Va.	250	135		98,687	731	101,579	12.0	9,450	9,418	11,960	846,492
Scranton, Pa.	156	117		81,797	699	102,285	14.9	6,671	2,545	28,800	684,559
Troy, N.Y.	150	117	40	77,129	491	38,066	3.5	16,311	13,845	5,200	1,081,844
Upper Darby, Pa.	200	129		95,425	740	70,672	9.2	31,293	35,216	14,775	769,898
Waterbury, Conn.	150	101		61,476	609	77,251	12.8	1,983	1,631	9,900	604,215
Wilmington, Del.	250	112	24	106,894	786	87,420	10.1	16,034	8,570	12,400	862,796
Yonkers, N.Y.	160	102		$ 49,126	$482	$ 47,573	10.8%	$10,438	$ 9,635	$ 7,020	$ 442,152
Average					$605						
Baltimore - Webster	175	113		$ 85,707	$758	$ 97,686	15.2%	$ 5,891	$ 2,874	$13,300	$ 641,769

Defendants' Exhibit 62C

DATA RESPECTING EASTERN DEALERS HAVING SALES POTENTIAL AND PERFORMANCE COMPARABLE TO WEBSTER.

1952

Location	Annual Sales Potential	New Unit Sales		Variable Gross Profit		Fixed Expense		Operating Profit	Net Profit	Officers' & Owners' Salaries	Total Sales (All Depts.)
		Packard	Other	Amount	Per New Unit Sold	Amount	% to Total Sales				
Allentown, Pa.	184	94		$ 58,805	$626	$ 60,098	9.7%	$ 4,812	$ 383	$ 9,400	$ 620,691
Brooklyn, N.Y. - Flatbush	179	81	53	62,984	470	104,184	14.2	(10,089)	(15,204)	10,467	736,249
Cleveland, Ohio	448	127		89,894	708	53,223	8.4	32,703	34,532	12,375	636,504
Elizabeth, N.J.	265	132	2	69,409	518	61,958	8.8	(4,642)	(1,637)	5,115	704,907
Erie, Pa.	239	103		62,866	610	72,398	9.5	(3,583)	788	6,276	760,178
Flushing, N.Y.	284	101		46,203	457	45,281	9.0	5,014	44	6,170	504,093
Hempstead, N.Y.	311	148	83	93,866	406	100,215	9.3	(13,191)	(6,731)	4,500	1,073,663
Jackson Heights & L.I.C., N.Y.	330	125		97,977	784	116,345	15.5	(1,005)	(4,542)	8,126	750,680
Johnstown, Pa.	144	92		57,075	620	113,418	11.8	(1,745)	(3,957)	28,800	957,624
Kingston, Pa.	210	75		49,935	666	90,718	18.6	(28,508)	(25,408)	25,200	486,445
Lancaster, Pa.	230	113		48,392	428	66,204	6.6	5,363	8,979	-o-	998,321
Mt. Lebanon, Pa.	170	93		58,063	624	66,922	10.6	(14,109)	(23,763)	6,600	633,462
North Philadelphia, Pa.	200	155		70,035	452	70,812	8.8	(2,270)	(4,670)	5,200	800,594
Philadelphia, Pa. - Frankford	165	82		34,556	421	45,441	10.7	(6,038)	(5,218)	5,200	423,515
Philadelphia, Pa. - Germantown	200	123		83,146	676	79,760	10.1	8,091	(9,170)	9,600	792,896
Reading, Pa.	225	114		77,075	676	104,032	12.5	(10,252)	(3,398)	14,300	830,691
Richmond, Va.	288	132		82,744	627	90,698	11.1	9,506	13,090	13,960	815,263
Scranton, Pa.	188	68		40,044	589	79,420	19.4	(30,135)	(24,784)	28,785	410,400
Troy, N.Y.	166	135	71	116,677	566	66,383	5.5	22,565	20,186	6,450	1,210,582
Upper Darby, Pa.	281	136		88,648	652	74,658	9.4	20,034	27,270	14,775	792,408
Waterbury, Conn.	135	97		49,393	509	72,084	11.3	(11,601)	(12,425)	7,750	640,623
Wilmington, Del.	248	112	25	94,957	693	94,921	10.8	1,427	1,132	13,500	876,805
Yonkers, N.Y.	140	95		$ 45,891	$483	$ 43,510	9.8%	$ 12,625	$11,115	$ 7,020	$ 443,908
Average					$571						

Defendants' Exhibit 62D

DATA RESPECTING EASTERN DEALERS HAVING SALES POTENTIAL AND PERFORMANCE COMPARABLE TO WEBSTER.

1953

Location	Annual Sales Potential	New Unit Sales		Variable Gross Profit		Fixed Expense		Operating Profit	Net Profit	Officers' & Owners' Salaries	Total Sales (All Depts.)
		Packard	Other	Amount	Per New Unit Sold	Amount	% to Total Sales				
Allentown, Pa.	235	110		$ 69,505	$632	$ 68,646	9.8%	$ 1,848	[illegible]1,776	$10,800	$ 702,597
Brooklyn, N.Y. - Flatbush	184	70	17	42,535	489	53,960	12.1	18,501	21,165	7,033	446,433
Cleveland, Ohio	448	155		134,344	867	76,338	8.8	54,358	56,174	14,550	862,890
Elizabeth, N.J.	259	141	6	56,958	387	63,039	8.1	19,018	16,181	4,940	781,511
Erie, Pa.	242	117		69,604	595	77,552	8.9	13,841	8,035	7,300	871,711
Flushing, N.Y.	287	105		47,883	456	43,219	8.0	5,018	158	5,240	540,529
Hempstead, N.Y.	309	168	22	84,637	445	110,265	11.5	669	598	19,325	957,914
Jackson Heights & L.I.C., N.Y.	316	169		111,103	657	143,351	15.1	13,984	16,269	24,910	953,168
Johnstown, Pa.	149	130		61,976	477	113,521	10.1	11,181	9,132	28,800	1,127,356
Kingston, Pa.	210	93		54,083	582	80,909	15.5	17,522	18,681	17,630	520,671
Lancaster, Pa.	230	110		46,418	422	57,759	6.6	7,881	7,244	3,900	877,269
Mt. Lebanon, Pa.	152	137		61,549	449	68,102	8.8	5,419	5,883	6,600	769,778
North Philadelphia, Pa.	197	157		65,118	415	70,509	8.3	18,455	4,499	6,405	845,147
Philadelphia, Pa. - Frankford	197	140		77,980	557	85,352	9.9	11,045	8,719	9,600	863,455
Philadelphia, Pa. - Germantown	165	93		36,522	393	47,163	9.6	1,635	3,669	6,075	491,509
Reading, Pa.	248	144		86,736	602	106,928	12.0	8,124	6,926	14,475	891,890
Richmond, Va.	288	118	13	82,102	627	89,057	10.6	[illegible]40	2,724	12,190	839,431
Scranton, Pa.	188	75		44,250	590	70,091	16.0	18,938	9,491	20,470	438,636
Troy, N.Y.	166	84	22	68,935	650	64,123	8.7	17,523	19,861	7,010	736,880
Upper Darby, Pa.	323	145		95,541	659	73,878	8.3	18,725	25,957	11,700	889,334
Waterbury, Conn.	133	135		64,445	477	76,994	9.2	9,018	9,014	5,470	835,112
Wilmington, Del.	240	110	22	82,125	622	95,256	11.2	10,936	7,953	13,300	847,173
Yonkers, N.Y.	139	117		$ 52,717	$451	$ 50,314	9.7%	$ 9,070	$ 9,495	$ 7,995	$ 519,698
Average					$546						

Defendants' Exhibit 62E

DATA RESPECTING EASTERN DEALERS HAVING SALES POTENTIAL AND PERFORMANCE COMPARABLE TO WEBSTER.

1954

Location	Annual Sales Potential	New Unit Sales		Variable Gross Profit		Fixed Expense		Operating Profit	Net Profit	Officers' & Owners' Salaries	Total Sales (All Depts.)
		Packard	Other	Amount	Per New Unit Sold	Amount	% to Total Sales				
Allentown, Pa.	99	95		$ 50,877	$536	$ 63,698	10.1%	$17,268	$12,911	$10,800	$ 633,231
Brooklyn, N.Y. - Flatbush	122	29	1	22,401	747	64,173	22.2	6,738	5,750	10,400	289,510
Cleveland, Ohio	281	125		75,000	600	76,524	12.5	6,325	9,072	16,200	610,266
Elizabeth, N.J.	134	105	1	45,083	425	54,415	9.4	16,581	10,860	4,785	577,419
Erie, Pa.	114	67		34,924	521	59,862	12.1	9,240	7,241	6,350	496,253
Flushing, N.Y.	153	40		15,756	394	34,879	13.6	6,042	2,903	3,900	256,231
Hempstead, N.Y.	184	91	14	43,357	413	81,129	13.7	1,845	493	7,150	591,982
Jackson Heights & L.I.C., N.Y.	293	92		78,324	851	107,919	16.4	4,833	3,760	-o-	659,492
Johnstown, Pa.	88	73	1	23,506	318	88,368	12.0	22,476	14,006	18,000	735,887
Kingston, Pa.	115	54		20,744	384	65,268	18.8	30,723	27,607	11,000	346,547
Lancaster, Pa.	96	108	5	38,758	343	75,346	8.0	9,836	10,351	2,990	943,914
Mt. Lebanon, Pa.	100	74		26,364	356	59,446	12.8	11,781	1,203	6,600	464,073
North Philadelphia, Pa.	150	75		34,012	453	50,745	10.1	17,375	13,912	5,075	502,520
Philadelphia, Pa. - Frankford	150	75		27,791	371	54,717	13.9	11,918	9,310	6,500	393,614
Philadelphia, Pa. - Germantown	150	81		51,081	631	72,026	12.7	10,267	11,240	8,600	567,858
Reading, Pa.	121	110		49,599	443	92,038	11.2	32,010	17,891	11,937	823,829
Richmond, Va.	244	83		53,178	641	86,191	14.3	13,393	9,795	11,960	601,992
Scranton, Pa.	111	41		14,904	364	56,665	21.3	29,536	17,413	11,575	265,959
Troy, N.Y.	76	48	4	29,411	566	38,138	10.8	12,731	15,065	-o-	353,336
Upper Darby, Pa.	162	108		76,426	708	84,103	12.9	773	3,065	21,499	651,133
Waterbury, Conn.	115	66		35,091	532	69,286	12.4	28,873	27,649	6,000	557,184
Wilmington, Del.	172	110	19	65,975	511	90,386	11.2	22,208	17,038	11,833	804,586
Yonkers, N.Y.	121	74		$ 32,189	$435	$ 42,420	11.7%	$ 6,280	$ 3,932	$ 8,480	$ 361,913
Average					$505						

TAX BENEFIT TO WEBSTER RESULTING FROM LEASEHOLD WRITEOFF AND NASH LOSS

Somerset Seafood Co. Operation Net Profit - 1953		$53,741.64
Webster Motor Car Co. Net Loss - 1953		
Operation	$31,285.80	
Leasehold writeoff	22,048.99	
Total Net Loss		53,334.79
Consolidated Net Profit - 1953		406.85
Federal Income Tax on $53,741.64		22,445.65
Federal Income Tax on $ 406.85		122.06
FEDERAL INCOME TAX SAVING		$22,323.59

Defendants' Exhibit 79 For Identification

TAX BENEFIT TO WEBSTER RESULTING FROM NASH LOSS

Somerset Seafood Co. Operation. Net Profit - 1953 ,	$53,741.64
Webster Motor Car Co. Net Loss (operation) - 1953	31,285.80
Consolidated Net Profit - 1953	22,455.84
Federal Income Tax on $53,741.64	22,445.65
Federal Income Tax on $22,455.84	6,736.75
FEDERAL INCOME TAX SAVING	$15,708.90

Defendants' Exhibit 80 For Identification

TAX BENEFIT TO WEBSTER RESULTING FROM LEASEHOLD WRITEOFF

Somerset Seafood Co. Operation Net Profit - 1953	$53,741.64
Webster Motor Car Co. Net Loss (leasehold writeoff) - 1953	22,048.99
Consolidated Net Profit - 1953	$31,692.75
Federal Income Tax on $53,741.64	22,445.65
Federal Income Tax on $31,692.75	10,980.23
FEDERAL INCOME TAX SAVING	$11,465.42

Defendants' Exhibit 81A

PACKARD - WASHINGTON ZONE --
STOCK OF NEW CARS ON HAND AT MONTH END
1951 - 1953

	1951	1952	1953
January	19	190	48
February	48	221	115
March	33	151	170
April	37	130	142
May	54	127	190
June	124	42	373
July	137	8	437
August	176	30	418
September	166	37	299
October	269	206	399
November	153	44	383
December	263	13	266

Defendants' Exhibit 81B

DeBAUGH - NEW PACKARD SALES
1950 and 1951

	1950	1951
January	0	1
February	3	1
March	1	2
April	3	0
May	2	0
June	1	0
July	0	1
August	2	2
September	1	1
October	2	9
November	1	1
December	2	1
Total	18	10

Defendants' Exhibit 81C

SALES BY PACKARD DEALERS OTHER THAN ZELL AND WEBSTER OF NEW PACKARDS TO OWNERS WITH ADDRESSES IN CITY OF BALTIMORE AND BALTIMORE AND HOWARD COUNTIES JUNE 1952 THROUGH 1953

Date	Report No.	Dealer	Owner	Owner's Address	Area*
1952					
6/12	109-52	Motor Serv. Center	Conrad W. Czerwinski	Main St., Reisterstown, Md.	Balt.
6/27	120-52	Covington Motor	Mary E. Hall	Highland, Md.	Howard
7/8	126-52	McNey-Kelbaugh	Morris C. Slater	Guilford Ave., Savage, Md.	Howard
7/31	143-52	Motor Serv. Center	Mary B. Filler	Grace Rd., Hampstead, Md.	Balt.
8/28	163-52	Motor Serv. Center	Shipley Transfer Inc.	534 Main St., Reisterstown, Md.	Balt.
9/5	168-52	Flake's Sales & Serv.	Fred Watson	6902 Mornington Rd., Dundalk, Md.	Balt.

* "Balt." denotes Baltimore County, "Howard" denotes Howard County, and "City" denotes City of Baltimore.

Defendants' Exhibit 81C

Report No.	Dealer	Owner	Owner's Address	Area
186-52	Motor Serv. Center	Byard J. Corey	821 Fairway Dr., Towson, Md.	Balt.
196-52	Motor Serv. Center	Sherman C. Sparks	Upperco, Md.	Balt.
206-52	Phillips Hardware Co.	Isaac N. Cox, Jr.	2449 Pickwick Rd., Gwynn Oak, Md.	Balt.
207-52	Covington Motor	Talmage G. Fink	Fulton, Md.	Howard
208-52	Motor Serv. Center	Thomas W. Meade	914 Southerly Rd. Towson, Md.	Balt.
216-52	Motor Serv. Center	Clifton J. March	Box 14, Providence Rd. Towson, Md.	Balt.
219-52	Motor Serv. Center	Robert C. Fenstermacher	Joppa Rd. Fullerton, Md.	Balt.
226-52	Motor Serv. Center	Ellinore R. Foote	6 Beech Dr., Apt. G Middle River, Md.	Balt.
108-52	Price Motors	John Fitchuk	517 Cathedral St.	City
120-52	Motor Serv. Center	Discount Furniture Corp.	643 W. Baltimore St.	City
121-52	R. C. Thompson Co.	Margaret Di Dominico	3029 Hamilton Ave.	City
124-52	Newton Motors	Fervin H. Shade	4120 Edmonson Ave.	City
127-52	Motor Serv. Center	Lavely D. Gruber	808 Walnut Ave.	City
129-52	Motor Serv. Center	George M. Hallock	14 Dunkirk Rd.	City
129-52	Quillin-Valliant	Etta W. Roe	3651 Chesterfield Ave.	City
129-52	R. C. Thompson	Mattie V. Green	1606 Round Hill Rd.	City
131-52	Motor Serv. Center	Morton Feldman	2916 Springhill Ave.	City

Defendants' Exhibit 81C

Date	Report No.	Dealer	Owner	Owner's Address	Area
7/25	139-52	J. M. Weeks Mtrs.	Wm. E. Weeks	819 E.Belvedere Ave.	City
7/29	141-52	Motor Serv. Center	Myrtle L. Sippel	518 Murdock Rd.	City
7/29	141-52	Motor Serv. Center	Samuel Weinberg	3525 Lucille Ave.	City
7/29	141-52	Motor Serv. Center	Caswell G. Nuger	5710 Harford Rd.	City
8/4	145-52	Motor Serv. Center	Wm. H. Whitmarsh	4413 Marble Hall Rd.	City
8/7	148-52	Motor Serv. Center	Edgar A. Collison	3720 Sixth St.	City
8/13	152-52	Follins Service	Edward C. Hull	1918 Letitia Ave.	City
8/19	156-52	Erickson-Packard Co.	Robert B. Sharps	Reedbird Ave.	City
8/29	164-52	Motor Serv. Center	Herd S. Eburg	3220 Keswick Rd.	City
10/6	188-52	Motor Serv. Center	Howard R. Kiefer	1654 Ramblewood Rd.	City
10/31	206-52	Motor Serv. Center	Thomas H. Buehler, Jr.	4421 Rokeby Rd.	City
1953					
1/12	2-53	Motor Serv. Center	Arthur Harrington	Randallstown, Md.	Balt.
1/14	4-53	Coston Motors	John Q. Andrews	6603 Sherwood Rd. Govans, Md.	Balt.
1/22	10-53	Motor Serv. Center	Robert L. Martin	533 St. Francis Rd. Towson, Md.	Balt.
1/26	12-53	Avalon Motors	Carl S. Mallow, Jr.	166 Sanford Ave. Catonsville, Md.	Balt.
2/13	25-53	Norman Davis Son	Joseph F. Polesne	R.F.D.Box 395 Fullerton, Md.	Balt.
2/16	26-53	Motor Serv. Center	Grace A. Stumpf	Reisterstown, Md.	Balt.

Defendants' Exhibit 81C

Date	Report No.	Dealer	Owner	Owner's Address	Area
2/27	34-53	Irwin Packard	Miles F. Daubenheyer	148 Riverthorne Rd., Middle River	Balt.
3/2	35-53	Greene St. Gar.	Joseph Goldsmith	842 Brunswick Rd. Essex, Md.	Balt.
3/2	35-53	Motor Serv. Center	Eugene J. Fink	7001 Alden Rd. Pikesville, Md.	Balt.
3/12	43-53	Motor Serv. Center	Edward H. Carrick	Timber Grove Rd. Owings Mills, Md.	Balt.
3/19	48-53	Motor Serv. Center	George J. Trautwein	Rt.14, Box 485, M.R.20	Balt.
3/26	53-53	Motor Serv. Center	Louis R. Tucker	Winans Rd. Randallstown, Md.	Balt.
3/27	54-53	Motor Serv. Center	Clarence E. Diehl	7213 Shipway Dundalk, Md.	Balt.
4/7	60-53	Motor Serv. Center	Mildred H. Langford	2711 Hammonds Ferry Rd. Hale, Md.	Balt.
4/10	63-53	Motor Serv. Center	Conrad W. Czerwinski	Reisterstown, Md.	Balt.
4/29	76-53	Irwin Packard	John W. Ward	Oakway Rd.& Sweetbriar Lane, Timon, Md.	Balt.
5/1	78-53	Covington Motors	Georgia C. Wilbur	107 Glenwood Ave. Catonsville, Md.	Balt.
5/1	78-53	Motor Serv. Center	Edward H. Burke	Green Levels, Reisterstown, Md.	Balt.
5/15	88-53	Coston Motors	Lloyd M. Barger	822 Kinston Rd., Govans, Md.	Balt.

Date	Report No.	Dealer	Owner	Owner's Address	Area
5/18	89-53	Irwin Packard	Edward Plummer	5 Florida Rd., Towson, Md.	Balt.
5/22	93-53	Motor Serv. Center	Edgar F. Benson	Upperco, Md.	Balt.
5/27	96-53	Follins Service	Donald E. Clem	Guilford Rd. Jessup, Md.	Howard
5/28	97-53	Motor Serv. Center	Abraham Watner	3509 Overbrook Rd., Pikesville, Md.	Balt.
6/5	103-53	Motor Serv. Center	James S. McGinnis	113 Croydon Rd., Govans, Md.	Balt.
6/18	112-53	McNey Kelbaugh	Miriam J. Keller	Simpsonville, Md.	Howard
6/24	116-53	Motor Serv. Center	Precision Built Homes, Inc.	Milford Mill Rd., Pikesville, Md.	Balt.
6/26	118-53	Rutrough Motors	Morris Skaist	7003 Deerfield Rd., Pikesville, Md.	Balt.
7/13	129-53	Irwin Packard	Arthur R. Worrall	Upper Glencoe Rd. Glencoe, Md.	Balt.
7/16	132-53	Motor Serv. Center	John C. Ennett	Owings Mills, Md.	Balt.
7/17	133-53	Motor Serv. Center	William A. Menchine	E.S. Manor Rd., Glen Arm, Md.	Balt.
8/11	150-53	Motor Serv. Center	John J. Murphy	Sacred Heart Church Reisterstown, Md.	Balt.
8/12	152-53	Motor Serv. Center	William S. Kerman	34 Dunmore Rd. Catonsville, Md.	Balt.

Defendants' Exhibit 81C

Date	Report No.	Dealer	Owner	Owner's Address	Area
8/25	160-53	Motor Serv. Center	Charles L. Costa	Maywood Ave., Towson, Md.	Balt.
8/25	160-53	Follin's Service	Nicholas Rabickow, Jr.	3 W.Old Annapolis Rd. Jessup, Md.	Howard
9/15	174-53	Motor Serv. Center	Willard F. Holland	111 Clarendon Ave. Pikesville, Md.	Balt.
9/17	176-53	Henry Lawrence	Leonard L. Greif, Jr.	3508 Old Court Rd. Pikesville, Md.	Balt.
10/8	191-53	Irwin Packard Co.	Columbus E. O'Donnell	Hampton Lane Towson, Md.	Balt.
11/18	218-53	Motor Serv. Center	John H. Dougher	409 Chestnut Ave. Towson, Md.	Balt.
11/19	219-53	Motor Serv. Center	Edna H. Leake	1700 Glen Keith Rd. Towson, Md.	Balt.
12/4	227-53	Motor Serv. Center	Wm. E. Hamilton	D-6 Beech Drive Middle River, Md.	Balt.
12/8	231-53	Irwin Packard	Earl R. M. Bittner	6 Locust Dr., Catonsville, Md.	Balt.
1/15	5-53	Motor Serv. Center	George A. Muntean	19 Lyndale Ave.	City
1/21	9-53	Irwin Packard	Emanuel A. London	2111 Sulgrace Ave.	City
2/6	21-53	Capitol Motors	Melvin Richman	3705 D. Parkview Ave.	City
2/6	21-53	Motor Serv. Center	Frank D. DiGiorgio	230 S.Patterson Pk.Ave.	City
2/9	22-53	Irwin Packard	Kyle E. Pilson	1825 E. 30th Street	City
2/16	26-53	McNey Kelbaugh, Inc.	Albert C. Moxin	1118 Homewood Ave.	City

Date	Report No.	Dealer	Owner	Owner's Address	Area
2/16	26-53	Motor Serv. Center	John W. Hecht	5019 Arburus Ave.	City
2/26	33-53	Erickson Packard	Theodore Klupt	3101 Carlisle Ave.	City
3/2	35-53	Motor Serv. Center	Alpha B. Beery	2213 Roslyn Ave.	City
3/10	41-53	Erickson Packard	Emil Paul	3041 Pinewood Ave.	City
3/12	43-53	Irwin Packard	August J. Idzik	1641 Shadyside Rd.	City
3/19	48-53	Motor Serv. Center	Walter J. Lippy	1629 Eutaw Pl.	City
3/19	48-53	Price Motors	Francis R. Dexter	1042 N. Calvert St.	City
3/26	53-53	Motor Serv. Center	Albert Gross	2520 Park Heights Ave.	City
4/6	59-53	Motor Serv. Center	Samuel Feldman	6910 Fieldcrest Rd.	City
4/9	62-53	Wayne Motors	Edward L. Sassaman	518 Old Home Rd.	City
5/8	83-53	Motor Serv. Center	Marshall J. Posner	2918 Strathmore Ave.	City
5/22	93-53	Packard Motors	Charles C. Greene, Jr.	6003 Highwood Ave.	City
5/28	97-53	Avalon Motors	Elmer C. Whipp	4121 The Alameda	City
5/29	98-53	Motor Serv. Center	DeVane Sibley	3115 Oakford Ave.	City
6/3	101-53	Capitol Motors	Rganar N. Hager	806 Venable Ave.	City
6/10	106-53	National Garage	Lee Aerenson	2906 Wynham Rd.	City
6/22	114-53	Irwin Packard	Kenneth McN.Esenwine	326 Marydell Rd.	City

Defendants' Exhibit 81C

Date	Report No.	Dealer	Owner	Owner's Address	Area
6/25	117-53	Erickson Packard Co.	Donald Wm. Walter	3224 Dudley Ave.	City
7/2	122-53	Irwin Packard Co.	Jack M. Fox	3128 Sequoia Ave.	City
7/17	133-53	Erickson Packard	Columbia Container Corp.	2200 Annapolis Ave.	City
8/20	157-53	Motor Serv. Center	Arthur E. Clark	3209 N. Charles St.	City
8/24	159-53	Motor Serv. Center	Stanley J. Yanusas	27 S. Stricker St.	City
8/28	163-53	Motor Serv. Center	James W. Brown	2702 Bauernwood Ave.	City
9/9	170-53	Motor Serv. Center	Delma E. Southall	3323 Willoughby Ave.	City
9/18	177-53	Capitol Motors	Blanche Kravetz	2318 Druid Park Dr.	City
9/21	178-53	Motor Serv. Center	Henry W. Scheye	3921 Edmondson Ave.	City
9/29	184-53	Motor Serv. Center	Edward C. Hull, Sr.	1918 Letitia Ave.	City
10/19	197-53	Motor Serv. Center	Garrett Wm. Cecil	2709 Cylburn Ave.	City
10/22	200-53	Motor Serv. Center	Henry P. Rodgers	3712 Mohawk Ave.	City

Defendants' Exhibit 81D

AVERAGE ANNUAL AUTOMOTIVE PROFITS

WEBSTER MOTOR CAR CO.

	1950	1951	Total
Profit per books	$9757.11	$1844.12	$11,601.23
Deductions from profit:			
Dividends and interest on securities	497.00	9.60	506.60
Gain on sale of securities	3008.90		3,008.90
Total deductions from profit	3505.90	9.60	3,515.50
Automotive profits	$6251.21	$1834.52	$ 8,085.73

AVERAGE ANNUAL AUTOMOTIVE PROFIT $ 4,042.87

Defendants' Exhibit 81E

ZELL - ADVERTISING - OTHER THAN COOPERATIVE

1951	$ 15,781.99
1952	20,928.04
1953	36,003.39

Defendants' Exhibit 81F

ZELL AND WEBSTER - NET WORKING CAPITAL
1951

	Zell	Webster
January	$212,597.88	$46,235.91
February	216,443.07	56,964.89
March	215,979.88	59,271.76
April	231,967.73	60,917.01
May	230,800.54	59,452.18
June	227,367.80	54,315.48
July	224,016.78	51,594.62
August	218,424.19	51,539.22
September	215,395.96	48,963.29
October	212,390.72	39,077.28
November	201,420.58	27,754.88
December	191,680.61	38,925.12
Average	$216,540.48	$49,584.30

Defendants' Exhibit 81G

ZELL - USED CARS TAKEN AS TRADE-INS ON NEW PACKARD SALES 1950-1953

	1950		1951		1952		1953	
	Packards	Others	Packards	Others	Packards	Others	Packards	Others
January	9	1	13	7	8	2	11	12
February	12	12	12	4	14	13	26	33
March	14	8	9	8	15	15	21	21
April	14	11	12	4	10	15	21	28
May	13	14	11	7	13	17	24	20
June	10	6	5	5	14	18	18	23
July	17	13	13	7	17	14	20	19
August	3	1	17	7	8	7	11	13
September	9	1	9	1	11	7	21	11
October	9	9	8	9	14	16	11	17
November	11	4	4	7	8	16	4	10
December	10	8	11	6	26	17	19	13
Total	131	88	124	72	158	157	207	220
Others % of Total	40.2%		36.7%		49.8%		51.5%	

Defendants' Exhibit 81H

WEBSTER - USED CARS TAKEN AS TRADE-INS ON NEW PACKARD SALES 1950 and 1951

	1950		1951	
	Packards	Others	Packards	Others
January	1	2	9	0
February	4	1	6	2
March	4	4	7	5
April	4	4	3	2
May	7	2	5	3
June	12	2	5	6
July	12	3	5	3
August	2	0	8	5
September	4	4	5	0
October	8	3	9	0
November	11	2	4	2
December	7	6	4	2
Total	76	33	70	30
Others % of Total	30.3%		30%	

Note:

Pages 1179 and 1180 are
at lower right card 16.

Office - Supreme Court, U.S.
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JUN 21 1957
JOHN T. FEY, Clerk

No. [redacted]213

APPELLEE'S PETITION FOR REHEARING IN BANC

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,152

PACKARD MOTOR CAR COMPANY, ET AL.,

Appellants,

v.

THE WEBSTER MOTOR CAR COMPANY,

Appellee.

Appeals from The United States District Court for the District of Columbia

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United States Court of Appeals
For the
District of Columbia Circuit
FILED
JUN -3 1957
Joseph W. Stewart
CLERK

WILLIAM J. HUGHES, JR.
Bowen Building
Washington, D. C.

DONALD D. WEBSTER
3502 Turner Lane
Chevy Chase, Md.

Attorneys for Appellee

Robert I. Thiel, Printer
Washington, D. C.
EX 3-0625

INDEX

	Page No.
Why Rehearing in banc is Desirable	1
The Factual Background	2
Proceedings Below and on Appeal	5
The Exclusive Dealership Issue Under Section 1 A the Sherman Act	7
Section 2 Monopoly Issues, and the du Pont case	13
Etroneous Treatment of Renewal Offer	18
Of 10 Largest Cities in 1952, Other 9 Averaged 12 Packard Dealers	19
Comments on Schwing Motor Co. v. Hudson Sales Co.	20
Conclusion	20
Appendix A - Charge of Holtzoff, J.	A-1
Appendix B - Circuit Court's Decision in present case, dated April 18, 1957	A-13

TABLE OF AUTHORITIES

Albert Pick-Barth Co. v. Mitchell Woodbury Corp. (CA 1) 57 F. 2d 96, cert. den. 286 U. S. 552 (1933).	12
Barr v. Matteo (D.C. App., Apr. 2, 1957) No. 13217	11
Bascomb Launder Corp. v. Telecoin Corp. 204 F. 2d 331 (2d Cir, 1952)	8
Board of Trade of the City of Chicago v. United States, 246 U.S. 231	13
Fargo Glass & Paint Co. v. Globe American Corp., 201 F. 2d 534 (7th Cir. 1953); cert. den. 345 U.S. 942 (1953)	8
Gameco, Inc. v. Providence Fruit & Produce Bldg. Inc. (C.A. 1); 194 F. 2d 484, cert. den. 344 U.S. 817	12
Hudson County Water Co. v. McCarter, 209 U.S. 349	11
International Salt Co. v. United States, 332 U.S. 392	10
Isbrandtsen v. United States (D.C. App. 1956), 239 F 2d 933	11
Lawlor v. National Screen Service Corp., 352 U.S. 992-995	17
Paramount Film Distributing Corp. v. Village Theatre, Inc. (C.A. 10) 228 F. 2d 721	11
Schwing Motor Co. v. Hudson Sales Co. (D. Md.) 138 F. Supp. 899; Aff. (C.A. 4) 239 F. 2d 176	20
Standard Oil of California v. United States, 337 U.S 293	10
Standard Oil Co of New Jersey v. United States, 221 U.S. 1 (1911)	8
United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898); 175 U.S. 211	8
United States v. Bausch & Lomb Optical Co., (S.D.N.Y.) 45 F. Supp. 387; aff. in part 321 U.S. 707	8
United States v. duPont & Company, 351 U.S. 377	6, 7, 12-17
United States v. Socony-Vacuum Oil Co., 310 U.S. 150	15

TABLE OF AUTHORITIES (Continued)

	Page
Webster Motor Car Co. v. Packard Motor Car Co. (D.C.), 135 F. Supp. 4	5
William Goldman Theatres, Inc. v. Loew's Inc. (C.A. 3), 150 F. 2d 738; cert. den. 334 U.S. 811 (1948)	12
Report of Attorney General's National Committee to Study the Antitrust Laws (1955)	9
Turner, Prof. Donald F., "Antitrust Policy and the Cellophane Case", Harvard Law Review, December 1956	15
"Resurgence of Exclusive Territorial Distributorships as an Antitrust Problem," 40 Minn. Law Rev. 853 (June 1956)	17

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 13,152

PACKARD MOTOR CAR COMPANY, ET AL.,

Appellants,

v.

THE WEBSTER MOTOR CAR COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLEE'S PETITION FOR REHEARING IN BANC

The Webster Motor Car Company petitions for rehearing in banc of the appeal in the above treble-damage antitrust action, in which a divided Court on April 18, 1957 reversed a judgment for $570,000, entered in favor of appellee after a jury trial on charges of an unlawful conspiracy of Zell Motor Car Company and Packard Motor Car Company in violation of Sections 1 and 2 of the Sherman Act. [1]

Petitioner believes that a rehearing in banc is merited because the case presents for decision for the first time in this Circuit questions of the greatest importance in the field of antitrust law, and because the majority decision of April 18th is not so clearly correct as to commend itself to acceptance by the full Court as the

---

1/ Service of summons on Zell could not be effected; and the case proceeded against Packard as the only served defendant.

considered view of the Circuit, -- at least not without full consideration and discussion by all the judges. The great importance of the issues was first asserted by Packard as the basis for an earlier request for an in banc hearing of its appeal, which request was not opposed by Webster.

The Factual Background

The evidence, in large part documents drawn from Zell's and Packard's files, warranted a finding of the following facts by the jury. [1]

For some years prior to World War II Packard cars had been marketed in the greater Baltimore Metropolitan area through Zell as the sole distributor. He appointed sub-dealers, of whom Webster was one from 1937 to 1942. Because of Zell's unrestricted power to revoke the sub-dealerships at will, he was able to, and did, control their operations with an iron hand. They were required to obtain cars and parts from Zell at his prices. They had to limit trade-in allowances to amounts approved by Zell. They could not sell to persons whom Zell wanted for himself. They could not charge less than Zell directed for service; nor advertise without his prior approval (See Appellee's brief p. 17).

After the war Packard changed to a multiple dealership set-up in Baltimore, under which dealers were franchised directly by Packard, and obtained their cars and parts directly from Packard at uniform prices, and were free to compete with one another as to sale prices, trade-in allowances and cost of service. Zell and Webster and two other dealers held such direct franchises in 1951.

The multiple dealership system was of great value to the Baltimore public as compared with the earlier arrangement under which the prices of everything connected with Packard cars and service were set by Zell at levels designed to yield him maximum returns.

1/ The facts are stated in great detail, with supporting record references, at pp. 2 to 21 of appellee's brief on appeal.

In the summer of 1951 Zell persuaded Packard to reduce the number of dealers from four to three on an assertion that the competition of other Packard dealers was causing him to operate "in the red", and that he was unwilling to continue in such a situation. On January 29, 1952 Zell renewed this assertion and threatened to give up his franchise unless Packard eliminated Webster and the other competing dealer.

Zell's statement that he was losing money because of the competition of the other Packard dealers was not true. His operations were in fact profitable; but in the closing months of each year they were converted into book losses by retroactive substantial increases of already ample salaries, doubtless for tax purposes. Packard knew this from the monthly operating reports required of all dealers. It repeatedly recommended and Zell ignored changes in operating and control techniques which Packard said would have increased Zell's profits from forty to sixty thousand dollars a year. (See Appellee's brief p. 6-8 and footnotes)

On February 11, 1952 Packard secretly agreed with Zell to do as Zell requested by refusing to renew the franchises of Webster and the other dealer when they expired on April 1, 1952. The franchises were not renewed, and the dealers were told that their termination was final. Packard gave them no reason for doing so.

All Packard dealer franchises (as is true of many makes of automobiles and other products) are written for one year periods expiring automatically each March 31st. Packard customarily renewed its dealers franchises from year to year in the absence of grounds for cancellation for cause because of conduct of the dealer.

Packard had no basis for cancellation of Webster's and the other dealer's franchises for cause. They were both satisfactory dealers and each was making money. Webster's gross business in 1951 was $641,769.41. Packard had neither considered nor contemplated their

non-renewal until Zell's demand.

There were special reasons for continuing Webster as a dealer. For many years he had sold more Packard cars than any other salesman. When his show-room was destroyed by fire in 1949, and he hesitated to make the $100,000 investment necessary to replace it, Packard urged him to do so and assured him that his franchise would be continued for many years.

There was no shortage of Packards. Enough were available to enable each of the dealers to make money.

The competing multiple dealership set-up in Baltimore had been established by Packard, and was acceptable to it, and would have been continued except for Zell's secret demand.

Packard concealed its agreement with Zell from the two dealers. It made no attempt to test the reality of Zell's threat to resign, nor to persuade him to continue. It did not seek a substitute to fill his place if he carried out his threat. Nor did it inquire whether Webster could enlarge his operations to take up the slack which would be caused if Zell quit.

On Webster's objection to the unexplained non-renewal of his franchise, Zell and Packard secretly agreed upon July 1, 1952, as a cut-off date acceptable to Zell, and tried to get Webster to agree to a new franchise limited to the period up to July 1. On Webster's refusal and continuing objection to its cancellation, Packard and Zell agreed in May 1952 that Packard should offer Webster a contract to run until March 31, 1953, subject, however, to an agreement between Packard and Zell, not disclosed to Webster, that Webster's franchise would not be renewed thereafter. Webster stated its willingness to accept the extension if Packard would state that it was offered in good faith rather than as a "reprieve of a death sentence". Packard refused to give such assurances, and Webster declined the offer because of this refusal.

There was evidence that following establishment of Zell's exclusive dealership he reverted to his former monopolistic practice of regulating the Baltimore Packard business at the point of maximum returns to him notwithstanding the injury to the public through loss of the advantages stemming from a competing dealership arrangement.

There was no evidence that the availability of other makes of automobiles made such monopolistic overcharging impossible. On the contrary there was evidence on which the jury could have found -- as apparently it did under the judge's charge--that notwithstanding the existence of other cars of various characteristics, prices and buyer appeal, there exists a Packard market in which multiple dealer competition is of great value to the public

Proceedings Below and on Appeal

The trial court (Holtzoff, J.) submitted the case to the jury under a charge which is printed in full as Appendix A to the present petition. Following a verdict for Webster for $190,000 (which the court trebled), Packard's motion for judgment n. o. v. or new trial was denied for the reasons stated in the Court's opinion reported at 135 F. Supp. 4. Packard appealed; and Webster cross-appealed as to the correctness of the trial court's reasons for fixing the amount of plaintiff's attorney's fee

On April 18, 1957, the majority of a divided court (Edgerton, C. J., and Prettyman, J.) held that it was improper to submit the case to the jury and that the motion for judgment n. o. v. should have been allowed. The Opinion is printed as Appendix B hereto. The majority declared that exclusive dealerships are per se lawful "when not part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels." They did not discuss the tests for determining when a "scheme to monopolize" exists; nor what is meant by "effective competition at both the seller and buyer levels." They did not comment on or evaluate the significance of the

evidence in this case outlined above. To the majority this was unnecessary because of their reliance on the Supreme Court decision in the so-called "celiophane case", United States v. du Pont & Company, 351 U.S. 377. They construed it is holding that there can be no monopoly or attempt or conspiracy to monopolize when the commodity involved is a particular make of automobile. The majority states that du Pont holds that there is "reasonable interchangeability" between Packard cars and other cars; which is in effect a holding that as a matter of law there is "effective competition" between Packards and other makes. This all amounts to a holding that in view of du Pont a manufacturer of automobiles can do whatever he pleases as to his distribution without ever violating the Sherman Act.

The dissenting Judge (Bazelon, J.) held that the trial court's instructions correctly stated the law applicable to conspiracies or combinations in restraint of trade in violation of Section 1 of the Sherman Act, and his belief that the evidence warranted submission to the jury and supported its verdict. He stated that the jury might well have found, as apparently it did, that Webster's elimination was not the result of a "unilateral decision by Packard in selecting its customers", but rather the result of an agreement stimulated by Zell to eliminate a competitor. He called attention to decisions and authoritative statements to the effect that vertical agreements to exclude a competitor from a substantial market are no less violations of the Sherman Act than horizontal conspiracies of competitors to accomplish such a result.

Thus we come to consideration of the important issues presented by the appeal, and to discussion of what we believe to be errors in the majority decision of such seriousness and extraordinary public importance as to warrant rehearing in banc.

The Exclusive Dealership Issue Under Section 1 of the Sherman Act

In ruling that it was erroneous to leave to the jury the determination of the reasonableness or unreasonableness of the restraint alleged to have been imposed on interstate commerce in violation of Sec. 1, the majority, quoting from a speech by Professor Milton Handler, said:

> "When an exclusive dealership 'is not part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels, the arrangement has invariably been upheld as a reasonable restraint of trade. In short, the rule was virtually one of per se legality' until the District Court decided the present case."

However, just prior to this, the majority, on its interpretation of du Pont, denied the possibility of any "scheme to monopolize" a single make of automobile. This it did by concluding that "effective competition" is ever-present among all makes of automobiles. It reasoned that duPont stands for the proposition that as a matter of law, the relevant market for determining effective competition encompasses all makes of cars.

The majority opinion in effect lays down for the first time the rule that an exclusive dealership in a trade-marked product is per se lawful although it is established because of the threat of a large dealer to quit buying from the manufacturer unless he stops selling to all the other then-competing dealers, provided competition from other somewhat similar trade-marked articles remains at both the manufacturer's and the preferred dealer's level.

There are many companies (e.g., RCA, John Deere, Esso, Chevrolet, Harley Davidson, etc.) which market their products through competing, independent dealers, many of whom have large capital investments in their business. The average capital investment of the forty thousand new car dealers in this country is $118,000. The

majority decision is an open invitation, with a grant of complete immunity under the Sherman Act, to every high-overhead dealer who is tired of competing with smaller, lower-overhead and frequently more efficient dealers to do as Zell did and force the manufacturer to boycott the competing dealers by threatening to quit if he refuses.

The majority rule conflicts with the following authorities, all dealing expressly with the tests which must be applied in determining whether an exclusive dealership is lawful or unlawful:

> United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898); 175 U. S. 211
>
> United States v. Bausch & Lomb Optical Co., 45 F. Supp. 387 (S. D. N. Y. 1942, aff'd in part, 321 U. S. 707 (1944)
>
> Fargo Glass & Paint Co. v. Globe American Corp., 201 F. 2d 534 (7th Cir. 1953), cert. denied, 345 U. S. 942 (1953)
>
> Bascomb Launder Corp v. Telecoin Corp., 204 F. 2d 331 (2d Cir. 1952); cert. denied, 345 U. S. 994 (1953)

None of the above authorities declared an exclusive dealership per se lawful. On the contrary, they all regard an exclusive dealership as neither per se lawful nor per se unlawful, and hold that its place within or without Section 1 of the Sherman Act depends on whether, on the facts of each case as measured by the Rule of Reason laid down in Standard Oil Co. of New Jersey v. United States, 221 U. S. 1 (1911), the restraint imposed is reasonable or unreasonable.

In the Bascomb Launder Corp. case, Judge Rifkind's elaborate exclusive dealership analysis in Bausch & Lomb was paraphrased as follows:

> If there is no monopoly, the restraint is not unreasonable if it is
>
> (a) ancillary to a reasonable main purpose, and
> (b) fairly protective of the exclusive dealer's interests but not so large as to interfere with the interests of the public.

Further proof that there is no such thing as a per se lawful exclusive dealership, and certainly not when set up by collaboration to eliminate a preferred dealer's competitors, is found in the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955). After reviewing the exclusive dealership cases, the Committee stated (p. 29):

> "In accord with this reasoning, the Committee concludes that where an exclusive dealership forms part of an attempt to monopolize prohibited by Section 2, or the lesser degree of unreasonable restraint prohibited by Section 1, it should be held a violation. On the other hand, where an exclusive dealership is merely an ancillary restraint, reasonably necessary to protect the parties' main lawful business purposes, such a dealership should be upheld where its effect is not unreasonably to foreclose competition from the dealer's market."

A moment's reflection will bring to mind a variety of exclusive dealership situations which immediately give rise to different reactions as to their fairness and the reasonableness of the restraints they impose. The setting up of an exclusive dealership when opening up a new territory is patently different from a situation where establishment of an exclusive dealership involves the elimination of, or refusal to deal thereafter with, one or more other dealers who have large capital investments in their enterprises A court's reaction to elimination of established competing dealers may well be affected by whether they were successful and desirable sales representatives. Certainly it would be affected if it were a fact that the manufacturer's output had become so small and the number of dealers so large that it was not possible for more than one to prosper

Or there may be a situation like that in the present case, where it is undisputed that there were plenty of cars to enable all the dealers to make money, and they were doing so, and the manufacturer had no complaint against any of them, and the competing multiple-dealership set-up was acceptable to the manufacturer and of great benefit to the public, and an exclusive dealership was secretly granted and the other

dealers destroyed at the request of the largest dealer who wanted an opportunity to enhance his profits through non-competitive fixing of prices to the injury of the public.

Traditionally, under the Rule of Reason, the propriety of an arrangement which affects trade and competition (as an exclusive dealership necessarily does) is judged on all the facts as to the nature of the business, the conditions before and after the arrangement is made, its actual or probable effect, the reason for its adoption, and the purpose or end sought to be attained. The District Court in the present case and the dissenting Judge on the appeal thought -- correctly as we believe -- that the reasonableness or unreasonableness of what was done was a question of fact for the jury.

The antitrust law is clear that it would have been unlawful per se if the competing Baltimore Packard dealers had agreed among themselves to fix prices in order to enhance their profits through non-competitive dealings. Yet under the majority decision, accomplishment of exactly the same kind of monopolistic price-fixing powers is declared lawful per se because it was brought about through an agreement between a powerful dealer and the manufacturer.

The invalidity of such a poles-apart distinction between horizontal and vertical conspiracies was pointed out by Judge Bazelon in the dissent where he said:

> "The Supreme Court has held that, even apart from monopolistic effect, a vertical agreement which excludes a competitor of one of the parties from a substantial market violates Sec. 1 of the Sherman Act. See Standard Oil of Calif. v. United States, 337 U. S. 293, 305 (1949), explaining International Salt Co. v. United States, 332 U. S. 392 (1947)."

Admittedly if the majority's rule stands that exclusive dealerships in trade-marked articles are per se lawful simply because they are in competition with other somewhat similar trade-marked articles, a very knotty and bothersome antitrust problem will have been greatly

simplified. However, the risk involved in resorting to such a shortcut and thus avoiding the expense and difficulty of such lengthly and hotly-disputed jury trials as the present case is twofold:

> First, a body of important antitrust principles, carefully laid down by prior cases, one at a time, upon the Rule of Reason itself, will be toppled; and
>
> Second, gross injustice will be worked as in the present case.

In short, rules of per se legality or per se illegality simplify antitrust problems but risk undermining the Rule of Reason itself.

The majority's unprecedented announcement of a per se lawful doctrine relative to exclusive dealerships constitutes a judicial attitude very difficult to harmonize with this Court's reasoning in the case of Isbrandtsen v. United States, 239 F. 2d 933 (Nov. 9, 1956), cert. granted March 22, 1957, where it declared per se unlawful the defendants' dual-rate system. This Court, prior to Webster, had never declared so absolute a privilege. In fact, on April 2, 1957, in Barr v. Matteo, No. 13217, where the Government was claiming an absolute privilege, this Court ordered supporting briefs on the question of whether the claimed privilege might not be qualified. That there are and should be few absolute rights in law (e. g., to set up an exclusive territorial dealership), see Hudson County Water Co. v. McCarter, 209 U. S. 349, 355 (1908), where Justice Holmes said:

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."

The majority opinion also conflicts with a recent unanimous decision of the Tenth Circuit which cites with approval the District Court's decision in the Webster case -- Paramount Film Distributing Corp. v. Village Theatre, Inc., 228 F. 2d 721. Chief Judge Phillips

held that a jury question is presented under Section 1 in cases like the present one even though the conspiracy be vertical rather than horizontal. In discussing the alleged conspiracy to restrain unduly interstate commerce in the showing of first-run pictures in the Salt Lake City area, Judge Phillips said (p. 726):

> "So, in the instant case, if Paramount Film entered into an agreement, express or implied, with United and Intermountain to favor Intermountain in the distribution of first-run pictures and to deny the Villa Theatre the right to bid for first-run pictures and to show day and date pictures, for the purpose of suppressing the competition of the Villa Theatre with Intermountain and to unreasonably restrain trade or commerce in first-run pictures in the Salt Lake City area, such agreement was unlawful and actionable."

(By substituting "Packard" for "Paramount Film" and "Zell" for "Intermountain," and "Packard cars" for "first-run films," the analogy is self-evident.)

Likewise the majority's conclusion that such exclusive dealerships are per se legal conflicts with the following cases:

> Albert Pick-Barth Co. v. Mitchell Woodburg Corp., 57 F. 2d 96 (1st Cir. 1932), cert. denied, 286 U. S. 552 (1933) (At. p. 102 the Court said: "If a conspiracy is proven, the purpose or intent of which is by unfair means to eliminate a competitor in interstate trade and thereby suppress competition such a conspiracy, we think is a violation of Section 1 of the Sherman Act. . .")
>
> William Goldman Theatres, Inc. v. Loew's, Inc., 150 F. 2d 738, 742, 743, (3rd Cir. 1948), cert. denied, 334 U. S. 811 (1948)
>
> Gamco, Inc. v. Providence Fruit & Produce Building, Inc., 194 F. 2d 484 (1st Cir. 1952), cert. denied, 344 U. S. 817.

In conclusion we respectfully submit that the proper rule, founded on the Rule of Reason itself and avoiding the unique and limited nature of du Pont, was stated by Judge Bazelon is his dissent when he said:

> "I think the court properly instructed the jury upon the law applicable to conspiracies or combinations in restraint of trade in violation of Section 1 of the Sherman Act and that the evidence supports the jury's finding in respect thereto. It is therefore unnecessary to decide whether the determination below of a conspiracy to monopolize in violation of Section 2 may also be sustained."

However, because we believe the majority opinion's fundamental error stems from a misunderstanding of and unwarranted extension of the rule laid down in du Pont; and because recent developments indicate that the Supreme Court will not condone this interpretation and extension of du Pont, we now turn to consideration of that case:

Section 2 Monopoly Issues and the du Pont Case

The majority's ruling that du Pont "makes clear" that "there was no monopoly, or attempt or conspiracy to monopolize within the meaning of the Sherman Act" conflicts seriously with the reasoning of the Supreme Court, and extends the decision into an area expressly excluded by that Court from its decision.

A. du Pont considered "relevant market" a question of fact, and its treatment indicates that the Court regards this issue as always one of fact on all the evidence in each case.[1] The majority opinion here, on the other hand, treats the matter as a question of law. This was

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[1] The majority opinion in du Pont said, "This Court must determine whether the trial court erred in its estimate of the competition afforded cellophane by other materials" (p. 381); "It is logical that some agreements and practices are invalid per se, while others are illegal only as applied to particular situations" (p. 387); "What is called for is an appraisal of the 'cross-elasticity' of demand in the trade. The varying circumstances of each case determine the result" (pp. 394-95); "The 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration" (p. 404). At pp. 397 to 405 various facts relating to cellophane and flexible packaging materials were discussed in great detail as a necessary preliminary to decision as to the trial court's ultimate finding of fact.

Mr. Justice Frankfurter in his concurring opinion says that decision as to alleged violation of Section 2 "cannot be established by general phrases. It must be determined with reference to specific facts upon considerations analogous to those by which Section 1 of the Sherman Act is applied" (p. 413), and quotes with approval Mr. Justice Brandeis' statement in Board of Trade of the City of Chicago v United States, 246 U.S. 231, 238, as to the necessity of deciding each case on its own facts.

The extended analysis of the facts in the opinion of the three dissenting du Pont judges indicates their position also that decision as to the industry or commodity before the court in each particular case must be based on the facts of each case. See du Pont pp. 415-424.

because of their unjustifiable acceptance of a statement as to automobiles and soft-drinks in Mr. Justice Reed's opinion as though it were the considered judgment of the Supreme Court that there cannot be a Section 2 violation with respect to any particular make of automobile.[1]

It is also to be noted that in du Pont the competition found as a fact to be important was that between cellophane and other flexible packaging materials, not the competition among cellophane producers. In contrast, in Webster the jury on substantial evidence and under specific instructions found as a fact that competition between Packard dealers was more important to the public than competition between Packards and other makes of cars.[2]

1/ The statement quoted and relied on by the majority reads as follows (p. 393): "This power" (over price and production of a manufacturer's product) "that, let us say, automobile or soft-drink manufacturers have over their trade-marked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product." This statement is not even a dictum to the effect given it by the majority. All that Mr. Justice Reed said was that the power which an automobile or soft-drink manufacturer has over the price and production of his commodity does not of itself make an illegal monopoly. He went on to say that "illegal power must be appraised in terms of the competitive market for the product." As we have pointed out, all members of the Supreme Court in du Pont hold that the existence and extent of any competitive market is a particular question of fact. The statement of the majority that other makes of cars are "reasonably interchangeable" with Packards is not supported by evidence to that effect; and there was much evidence to the contrary.

2/ The trial court instructed the jury: "Coming now to the third element, namely, that the alleged unlawful conspiracy or agreement adversely affected the interest of the public, the plaintiff offered evidence tending to show that the public interest is promoted by competition among dealers in the same make of cars, since by such competition a prospective customer may choose as between dealers in an effort to get the best possible terms on such matters as allowances for used cars, better service, and the like. The defendant on the other hand claims that the only real competition is as between different makes of cars, and not between dealers in the same make of car and that, therefore, elimination or restraint of competition between dealers in the same make of car does not affect competition, and does not constitute a restraint of trade. What the fact is is for you to determine, ladies and gentlemen of the jury."

It also charged that plaintiff could not recover unless the jury found that there existed an "unlawful conspiracy or agreement (which) adversely affected the interests of the public." There was ample evidence to support a finding of such injury from Zell's dominance of the Baltimore Packard market, notwithstanding the existence of some measure of competition between Packard and other makes of automobiles.

B. The majority erroneously holds that du Pont precludes as a matter of law a decision that there was an attempt or conspiracy on the part of Zell, aided and abetted by Packard, to monopolize in the present case. [1]

The present case does not involve a Section 2 charge of one-company monopoly, as du Pont did. To the extent that Webster's case rests on Section 2, it is on the basis of an unreasonable and illegal conspiracy or agreement to eliminate multiple competing Packard dealerships theretofore established by Packard and wholly satisfactory to it and of great value to the public, and to put Zell in a position where he could monopolize the Packard market in that large area - to the disadvantage of the public.

Unfortunately not until three months after the oral argument on appeal did the scholarly article of Donald F. Turner, Professor of Antitrust Law, Harvard Law School, appear in the December 1956 issue of the Harvard Law Review under the title "Antitrust Policy and the Cellophane Case". In this article, not heretofore brought to this Court's attention, Professor Turner said at P. 305:

> "If defendants are attempting to drive someone out of the market by foul means rather than fair there is ample warrant for not resorting to any refined analysis as to whether the intent is to drive everyone out or whether, having taken over all of the production of a particular commodity, the defendants would still face effective competition from substitutes. Coercive conduct is analogous to price fixing, attempts at which are illegal, 'though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity. United States v Socony-Vacuum Oil Co , 310 U. S. 150, 225 n. 59 (1940).'"

1/ At p. 3 the majority in the April 18th decision says "And there is no evidence of any attempt or conspiracy to create a monopoly, since there is no evidence of any attempt to get control of the relevant market." (Italics supplied) Coming as it does after the majority's ruling that du Pont holds that there was "reasonable interchangeability" between Packards and other automobiles this statement amounts to a holding that where a manufacturer cannot be convicted under Section 2 of a one-concern monopoly, it is impossible to establish his violation of Section 2 through an attempt or conspiracy to monopolize that commodity.

and at P. 307.

> "It is reasonable to discard any refined concept of market in attempt and conspiracy cases because the conduct involved is so egregious that it may be appropriately condemned per se."

The majority's interpretation improperly makes du Pont applicable in the area of conspiracies and attempts to monopolize, in the face of the fact that this area was expressly excluded by the Supreme Court from its decision in that case. The Supreme Court said, at p. 379: "The appeal, as specifically stated by the government, 'attacks only the ruling that du Pont has not monopolized trade in cellophane'. At issue for determination is only this alleged violation by du Pont of Section 2 of the Sherman Act"; and, at p. 381, that "the government specifically excludes attempts or conspiracies to monopolize from consideration."

To treat du Pont, as the April 18th opinion did, as a decision that there can be no Section 2 violation with respect to a commodity the maker of which might not be convicted of a one-concern monopoly thereof, amounts to saying that by du Pont the Supreme Court overruled a long line of its earlier decisions affirming convictions for conspiracies or attempts to monopolize in cases involving only parts of a market or parts of interstate commerce.

That the Supreme Court had no such intention is clear from Mr. Justice Reed's citations in support of his statement at p. 395 that "illegal monopolies under Section 2 may well exist over limited products in narrow fields where competition is eliminated"; and his comments and citations at pp. 386-7 with respect to the "Rule of Reason" in antitrust law.

C. We also direct attention to the comments of the dissenting Justices in du Pont on the obvious economic fact that notwithstanding the possibility of a point somewhere where interchange of commodities

will occur, there nevertheless exists an area short of the interchange point where the public and small business need protection under the Sherman Act. At pp. 424-5 they say:

> "The majority hold in effect that, because cellophane meets competition for many end uses, those buyers for other uses who need or want only cellophane are not entitled to the benefits of competition within the cellophane industry. ...As the recent report of the Attorney General's National Committee to Study the Antitrust Laws states: 'In the interest of rivalry that extends to all buyers and all uses, competition among rivals within the industry is always important (emphasis added).' Furthermore, those buyers who have 'reasonable alternatives' between cellophane and other products are also entitled to competition within the cellophane industry, for such competition may lead to lower prices and improved quality."

An excellent discussion of the validity of these principles in cases involving automobiles appears in 40 Minn. Law Review 853 (June 1956) under the title "Resurgence of Exclusive Territorial Distributorships as an Antitrust Problem". The article concludes that the District Court's handling of the present case was sound.

We doubt that this Court will want to go on record as excluding the applicability to the present case of the principles just quoted, in view of the fact that the evidence clearly showed the injury done the public by Zell during an earlier period when he had a Baltimore monopoly and evidence of his greedy desire for a return of monopolistic gouging.

There has been a notable change in the make-up of the Supreme Court since the 4 to 3 decision of du Pont. The present Court has shown an extreme sensitivity to interpretations of du Pont by its unusual treatment of the petition for certiorari in Lawlor v. National Screen Service Corporation, 352 U. S. 992-995. The District Court had ruled that an exclusive distributorship arrangement was per se unlawful. The Circuit Court reversed and remanded on the ground that issues of fact

requiring trial were presented. In its opinion it made statements as to what du Pont held. The Supreme Court -- agreeing that remand was proper -- granted certiorari only for the purpose of stating to the District Court in a per curiam decision that it need not be bound by what the Circuit Court had said about du Pont.

Erroneous Treatment of Renewal Offer

The majority opinion would lead a reader to believe incorrectly that appellee refused a "usual renewal" of his franchise at a time when he was still a franchised dealer. The evidence is clear that in February 1952 Packard secretly agreed with Zell that it would give him his requested Baltimore monopoly on March 31, 1952 by not renewing the franchises of the competing dealers which expired on that date; that the franchises were not renewed on their expiration and the dealers were told that the terminations were final; that on Webster's objection to this treatment Zell and Packard secretly agreed on July 1, 1952, as a cut-off date acceptable to Zell and tried to get Webster to agree to a franchise limited to the period up to July 1; that on Webster's refusal and continuing criticism of the cancellation, Packard and Zell agreed in May 1952 that Packard should offer Webster a contract to run until March 31, 1953, subject, however, to an agreement with Zell, not disclosed to Webster, that its franchise would not be renewed thereafter; that Webster stated its willingness to accept the extension if Packard would state that it was offered in good faith rather than as a "reprieve of a death sentence", and that Packard refused to give such assurances, and that Webster declined the offer because of this refusal.

Judge Bazelon correctly stated that the District Court properly left to jury decision the questions whether the renewal was offered in good faith or pursuant to a secret agreement between Zell and Packard that it was to be the last renewal.

Of 10 Largest Cities in 1952, Other 9 Averaged 12 Packard Dealers

Packard's Washington Zone Manager, Beck, admitted that before Zell's "ultimatum" (J. A. 260), he (Beck) had never recommended that Baltimore become a one-Packard dealer city (J. A. 265). Braden, Beck's predecessor, testified that while Packard Zone Manager from 1945 to 1950, he had never thought that one Packard dealer could handle Baltimore (J. A. 442).

The majority opinion states, however:

> "Of Packard's 1600 dealers, 1100 were the only Packard dealers in their cities, some of which were nearly as large as Baltimore, and such a ratio was typical in the automobile industry."

Assuming there were 1100 such "cities", Webster has never claimed that exclusive dealerships are per se unlawful; only that they are not per se lawful.

As we pointed out at page 33 of our main brief on appeal (with record references), the $1,350,000 worth of Packard business which went to Zell in 1953 after he and Packard had wiped out Webster, was sufficient to maintain 4 of the 9 Packard dealers then competing in Metropolitan Washington, D. C.

Contrary to the inference that it was Packard's usual practice in 1952 to distribute through exclusive dealerships in large metropolitan areas, the following is a tabulation of the "Authorized Packard dealers" whose names are listed in the official Packard Motor Car Company ads in the yellow pages of the 1952 telephone directories for the ten most populous cities according to the 1950 census.

LARGEST CITIES	COMPETING PACKARD DEALERS	LARGEST CITIES	COMPETING PACKARD DEALERS
1 New York (Queens, Bronx, Manhattan and Brooklyn)	19	5 Detroit	15
2 Chicago	17	6 Baltimore	4
3 Philadelphia	12	7 Cleveland	8
4 Los Angeles	14	8 St. Louis	2
		9 Washington, D.C.	9
		10 Boston	13

Baltimore by June, 1952, had 1 Packard dealer (Zell) compared to an average of 12 in the other 9 cities.

Comments on Schwing Motor Co. v. Hudson Sales Co.

The majority opinion places great reliance on Schwing Motor Co. v. Hudson Sales Co., 138 F. Supp. 899 (D. Md 1956); aff'd 239 F 2d 176 (C.A. 4, 1957). We believe that Schwing was wrongly decided but whether or not it was is certainly not controlling here. The Maryland District Court recognized that that case differed from Webster in certain critical respects. According to Chief Judge Thomsen (pp. 905-6), "Packard gave Zell an exclusive contract in the Baltimore area and eliminated all rival dealers", whereas in Schwing, in addition to Bankert (Zell's counterpart), there were two other Hudson dealers left in the Baltimore metropolitan area after Schwing was eliminated. This enabled that Court to state (p. 904):

> "It is not alleged that the public could not have bought as many Hudson automobiles as it wishes, either from Bankert or from the two other Hudson dealers in the Baltimore metropolitan area . . . or even that it was unable to buy at competitive prices all of the Hudson automobiles that it wished to buy." (emphasis supplied).

Schwing does not involve the establishment of an exclusive territorial dealership and therefore does not justify the majority's reliance upon it.

CONCLUSION

The petition for Rehearing should be granted.

Respectfully submitted,

WILLIAM J. HUGHES, JR.
Bowen Building
Washington, D. C.

DONALD D. WEBSTER
3502 Turner Lane
Chevy Chase, Md.

ATTORNEYS FOR APPELLEE

CERTIFICATE

I hereby certify that the foregoing petition is filed in good faith and not for delay.

Donald D. Webster
3502 Turner Lane
Chevy Chase, Md.

Attorney for Appellee

APPENDIX A

CHARGE TO THE JURY

1924 The Court (Holtzoff, J.): Ladies and gentlemen of the jury: This long trial has now come to an end and the issues of fact are to be submitted to you for final decision. Your decision must be reached soley on the evidence introduced at this trial. You must arrive at your conclusion deliberately, fairly, and impartially, without any feeling or emotion of any kind. The case has been ably and thoroughly presented by counsel on both sides. Of necessity a great deal of evidence, both oral and documentary, has been introduced by each party. This could not be avoided for a proper presentation of all the issues. Nevertheless, the issues to be decided by you are few and simple, and it will be my endeavor to simplify and reduce them to a minimum so as to facilitate your labors as much as possible.

The plaintiff, Webster Motor Car Company, sues the defendants, Packard Motor Car Company and two of its officers, Marshall Beck and C. M. Porter, for damages which the plaintiff claims it sustained as a result of a violation of the antitrust laws, alleged to have been committed by the defendants. It now becomes your duty to determine, first, whether the plaintiff is entitled to recovery; and second, if the plaintiff is entitled to recover, then in what amount.

1925 As I have had occasion to explain to you in other cases in which you have participated during your term of service, it is my function and my duty to instruct the jury as to the rules of law that must govern the disposition of this case. You, ladies and gentlemen of the jury, are obligated to take the law from the Court, and to follow the Court's instructions as to the law. But on the other hand, you ladies and gentlemen of the jury, are the sole judges of the facts. You must determine the facts yourselves from the evidence introduced at this trial. The law authorizes the Court in its charge to the jury to discuss the

evidence for the purpose of aiding and assisting the jury in arriving at its conclusions, but the Court's discussion of the evidence, and the Court's comments on the facts and on the evidence are not binding on you and you need attach to them only such weight as you deem wise and proper. If your recollection or your understanding of the evidence differs in any respect from the Court's recollection or the Court's understanding, then it is your recollection and your understanding that must prevail for, as I said to you a moment ago, you are the sole and final judges of the facts. My instructions are binding on you only as to the law.

1926 Now, I shall begin by reviewing a few general principles of law that are applicable to this case as well as others. The burden is on the plaintiff to prove his claim, or its claim, by a fair preponderance of the evidence. The words "preponderance of the evidence" mean that in order that you may find a verdict for the plaintiff, you must be reasonably satisfied that the plaintiff's allegations are true. This requirement does not mean that the plaintiff must produce a greater number of witnesses than the defendant, but as I have just stated, merely that you must be reasonably satisfied of the truth of the allegations, of the plaintiff's allegations. I can state the same thought in a somewhat different way. "Preponderance of the evidence" means evidence of greater convincing force. The duty of the jury is to weigh the evidence carefully as in a pair of scales, and to find a verdict for the party in whose favor the evidence preponderates, that is, on whose side the scale goes down. If the evidence is evenly balanced, then the verdict must be for the defendants.

Now, previously to participating in this trial all of you were sitting on criminal cases during this term of service. In each criminal case you were instructed by the Court that the Government must prove its case against the defendant beyond a reasonable doubt. In order to prevent any confusion of thought the Court wants to make it clear to you

1927 that this rule does not apply to civil cases, and the case we are now trying is a civil case, but as I have already informed you, in a

civil case the plaintiff need make out his proof only by a preponderance of the evidence, or a fair preponderance of the evidence.

In determining the issues of fact submitted to you you will consider and weigh the testimony of all the witnesses who have testified at this trial, all of the documents that have been introduced in evidence, as well as all the circumstances concerning which testimony has been introduced because circumstances frequently throw an illuminating light on oral or documentary testimony. You are the sole judges of the credibility of witnesses. I mean by that it is for you and you alone to determine what witnesses to believe, and the weight to be attached to the testimony of any witness.

Several of the witnesses in this case did not personally testify in court. Their testimony was taken prior to the trial before a notary public, and the transcript of that testimony was read at the trial. Testimony taken in this manner is known in the law as a deposition. Such testimony is entitled to the same consideration and to the same judgment on your part with reference to its weight as is the testimony of witnesses who testified orally and in person on the witness stand. You are not to discount any testimony given by deposition merely because it comes to you in that form.

1928

This brings me to a consideration of the issues involved in this case, now that I have completed preliminarily a summary of a few general principles of law. The specific claim involved in this case is as follows: The plaintiff, Webster Motor Car Company, was a dealer in Packard cars under a contract, or a franchise, as it is sometimes called, with the defendant Packard Motor Car Company, the manufacturer. The plaintiff's place of business was located in Baltimore. In the same area there were three other Packard dealers operating in the same manner as the plaintiff, under contract or franchises with the manufacturer. The plaintiff claims that one of these other dealers, the Zell Motor Car Company, entered into a conspiracy with the defendant, Packard Motor Car Company -- that is an agreement with the defendant, Packard Motor Car Company -- to eliminate all competing dealers in the

Baltimore area, and to give the Zell Motor Car Company an exclusive right to the sale of Packard cars within the area. The plaintiff further claims that pursuant to this conspiracy or agreement, Packard refused to renew the plaintiff's contract, or franchise, as well as the contract or franchise of one other Packard dealer in this area, a man named
1929 DeBaugh, and it failed to fill the place of another dealer, Schulte, who had previously given up his business. The plaintiff further claims that Packard made, in effect, the Zell Motor Car Company the exclusive dealer for Packard cars in the Baltimore area. The plaintiff further claims that this conspiracy or agreement constituted a violation of the antitrust laws. The plaintiff seeks to recover damages caused to it as a result of being eliminated as a Packard dealer by means of such a conspiracy or agreement, and as a result of the consequent destruction of its business. It is for you to determine whether these facts have been established by a preponderance of the evidence.

The defendants admit that Packard refused to renew the franchise of the plaintiff and of DeBaugh, and that it failed to fill the place of Schulte, and that it, in effect, granted to Zell Motor Car Company an exclusive opportunity to sell Packard automobiles in the Baltimore area. The defendant claims on the other hand that this was done in the exercise of permissible business judgment and discretion, and not pursuant to any illegal conspiracy or agreement with anyone else. The defendants make still two other contentions. First, Packard claims that the plaintiff agreed to liquidate its business anyway; and second, the defendants call attention to the fact that Packard offered to the plaintiff a renewal of its
1930 contract for one year, which the plaintiff refused. The defendant seeks to draw the inference that it did not destroy the plaintiff's business but that the plaintiff refused to continue as a dealer.

The plaintiff responds by saying and contending that the defendant's offer of a renewal was not made in good faith, but that it was advanced only after Packard had decided to make Zell the exclusive dealer in the Baltimore area, and only after Packard had announced to the plaintiff that the plaintiff would no longer be permitted to remain as a Packard

dea'er. Plaintiff further claims that when the plaintiff protested against the failure to renew its contract, the defendant purely in an effort to stave off litigation, offered a year's renewal with the secret intention, pursuant to an alleged agreement with Zell, to terminate the dealership at the end of another year. The plaintiff claims that this was a belated offer on the part of the defendant Packard, and was not made in good faith, and therefore does not detract from the fact, that the defendant, Packard, destroyed the plaintiff's business.

It is for you, ladies and gentlemen of the jury, to determine from the evidence in this case what the facts were as to these various contentions and whose contentions are true.

1931 This brings me to a discussion of the law that is applicable to this case. The pertinent provisions of the antitrust law, popularly known as the Sherman Act, that no doubt many of you have heard about from time to time, and which govern the disposition of the plaintiff's claim, read as follows:

"Every contract or conspiracy in restraint of trade or commerce among the several states is declared to be illegal."

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states shall be deemed guilty of a misdemeanor."

1932 I shall read these two provisions again because they are brief, but important, and I am reading only the provisions that are pertinent to this case:

"Every contract or conspiracy in restraint of trade or commerce among the several states, is declared to be illegal."

And second:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, shall be deemed guilty of a misdemeanor."

The word "conspiracy" as used in the statute merely means an agreement to do an illegal act, namely, an agreement in restraint of interstate trade or commerce, or an agreement to monopolize or attempt to monopolize.

In order to establish a right to recover damages the plaintiff under these statutory provisions must establish the following elements:

First. That the defendants entered into a conspiracy, that is an agreement with someone in unreasonable restraint of trade, or a conspiracy with someone, that is an agreement with someone, to monopolize any part of trade or commerce.

Second. That the trade or commerce affected by the unlawful
1933 conspiracy or agreement was interstate trade or commerce, and not merely trade or commerce within a single State.

Third. That the unlawful conspiracy or agreement adversely affected the interests of the public.

Fourth. That as a result of actions taken pursuant to the unlawful conspiracy or agreement, the plaintiff was damaged.

Now let me go back to each of these four elements and elaborate them somewhat. The first element is a conspiracy, that is, an agreement in unreasonable restraint of trade, or an agreement to monopolize any part of trade or commerce. The antitrust laws do not forbid every restraint of trade or commerce. They forbid only such restraints as are unreasonable. The second kind of conspiracy or agreement that is forbidden by the antitrust laws is a conspiracy or agreement to monopolize any part of trade or commerce. In order to recover the plaintiff is not required to prove both. The plaintiff must prove either one or the other, either an agreement to which the defendants were parties in unreasonable restraint of trade, or an agreement to which the defendants were parties to monopolize any part of trade or commerce. In
1934 this connection, it must be said that a business concern has a right to select its customers and has a right to sell its products to whomever it chooses, and it may choose one potential customer in preference to another. That is a part of the American system of free

enterprise. There is, however, this important qualification. The right to select one's customers is a right that may be exercised without ulterior motives, free from compulsion, and without agreements with others that tend to restrain trade or to create a monopoly. The law prohibits the exercise of this right pursuant to an agreement, or arrangement or conspiracy between two or more individuals or two or more business concerns, to exclude other business concerns from trade or commerce, or to create a monopoly, or substantial monopoly, for one of the parties to the agreement, arrangement, or conspiracy. The plaintiff's contention in this case is, as I have indicated, that the defendants refused to renew the plaintiff's franchise and sought to create an exclusive dealership, or a monopoly in one concern, not in the exercise of its best business judgment, but from ulterior motives, as a result of compulsion, or pressure, or an agreement with a competitor of the persons who were excluded from the field pursuant to the conspiracy. If a person enters into an illegal agreement, or conspiracy, in violation of the Sherman Law, his motive in so doing is
1935 immaterial. It makes no difference whether his motive was good or bad, whether he thought that what he was doing was permissible and was for the best interests of his business, or not. The law prohibits certain agreements in restraint of trade, or certain agreements that attempt to monopolize. The illegality is not affected by motives, good or bad. A good motive does not make an illegal agreement legal, and a bad motive does not make a legal agreement illegal. A bad intent or malice against the plaintiff need not be proved in order to justify a recovery in favor of the plaintiff.

Coming to the second element that the plaintiff must establish, namely, that the trade or commerce affected by the alleged unlawful conspiracy or agreement, was interstate commerce, the undisputed facts are that the Packard cars referred to in this case were shipped from Detroit, Michigan, or from the District of Columbia to Baltimore, Maryland. Such shipments constitute interstate commerce. The plaintiff contends that the flow of this commerce and the transportation

of cars between the factory in Detroit, or the zone office in Washington and the dealers in Baltimore, was affected and restrained by being diverted to a single dealer. If you find that there was an unlawful conspiracy to restrain trade, or to create a monopoly in this case,
1936 you also have a right to find that the trade or commerce that was affected was interstate commerce.

Coming now to the third element, namely, that the alleged unlawful conspiracy or agreement adversely affected the interests of the public, the plaintiff offered evidence tending to show that the public interest is promoted by competition among dealers in the same make of cars, since by such competition a prospective customer may choose as between dealers in an effort to get the best possible terms on such matters as allowances for used cars, better service, and the like. The defendant on the other hand claims that the only real competition is as between different makes of cars, and not between dealers in the same make of car and that, therefore, elimination or restraint of competition between dealers in the same make of car does not affect competition, and does not constitute a restraint of trade. What the fact is is for you to determine, ladies and gentlemen of the jury.

The last element that the plaintiff must establish is that pursuant to the alleged unlawful conspiracy or agreement, the plaintiff was damaged. The plaintiff claims that its business was destroyed as a result of the alleged unlawful agreement or conspiracy between Packard and Zell. The defendant on the other hand claims that the plaintiff had
1937 agreed to liquidate his business in any event, and that further the plaintiff's business was discontinued as a result of the plaintiff's own choice in refusing to accept a renewal for another year. The plaintiff responds by saying that the refusal to accept the renewal was due to the fact that the offer of renewal was not made in good faith, and with a mental reservation to cancel the franchise at the end of another year. I have already referred to the respective contentions of the parties on this point in a little more detail. The facts are for you to determine.

Now, ladies and gentlemen of the jury, if you decide the issues in favor of the defendant, that ends the case and you will bring in a verdict for the defendants. If you decide the issues in favor of the plaintiff, then you have to take still a further step and determine the amount of damages that should be awarded to the plaintiff. The damages to be awarded by the jury should be in such amount as would in the opinion of the jury fairly and reasonably compensate the plaintiff for the financial or pecuniary loss to its business, --in other words the amount of money that the plaintiff lost in its business as a result of the illegal acts of the defendants.

The jury may not merely speculate or guess at an amount, or fix an amount arbitrarily The amount of damages to be awarded by the
1938 jury must be based on the evidence. The evidence must supply information from which the jury may determine as a matter of reasonable inference the amount that the plaintiff probably lost. This does not mean that the evidence must show the exact and precise sum of money that the plaintiff lost Ordinarily it is impossible to make an exact computation The law does not require the impossible. Otherwise the wrongdoer might entirely escape the liability of paying damages caused by his illegal acts The law throws the risk of uncertainty on the wrongdoer rather than on the injured party, for otherwise the wrongdoer could profit at the expense of his victim. It is enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, even though the result may be only approximate.

The jury has a right to form a reasonable and probable estimate, in the exercise of good sense and sound judgment, of the amount that will constitute fair and adequate compensation. The jury may make a just and reasonable estimate of the damage, based on the evidence, and render its verdict accordingly.

The measure of damages in this case is what was the value of the plaintiff's business claimed to have been destroyed by the defendant's illegal acts. In order to arrive at such a valuation the jury may consider

the evidence of net profits that the plaintiff might have reasonably expected to make during a reasonable period of time following the illegal
1939 acts of the defendants, if such acts have prevented the plaintiff from realizing such profits. Now such profits are not necessarily the final and definite measure of damages but they are an element and a circumstance that the jury may consider, together with all the other facts and circumstances in the case, in determining the amount of damages that the plaintiff has sustained in its business. The plaintiff has offered proof which it says tends to show what profits might have reasonably been anticipated as of the date of the termination of its contract, namely, March 31, 1952. It introduced evidence to the effect that business at that time was at an upswing; that the plaintiff was making profits in 1952 at a greater rate than it had made in 1951; that the outlook for business was good because the year before Packard had put out a new model that was meeting with public favor. On the other hand the defendant has offered evidence to the effect that in 1953 many dealers of approximate the same size as the plaintiff, sustained a loss instead of making a profit. The plaintiff offered evidence from its books of account, through a certified public accountant, to the effect that during the period beginning in 1946 and ending March 31, 1952, the
1940 plaintiff's net profits from the automotive business averaged approximately $36,479 a year. I said "net profits"; I should have said "gross profits."

In considering the number of years that the plaintiff would have continued in the automobile business except for the defendant's alleged illegal acts, the jury is entitled to consider the plaintiff's history of operations for the 15-year period between 1937 and 1952. The jury is also entitled to consider testimony to the effect that franchises of efficient dealers are ordinarily renewed from year-to-year for a substantial period of time.

You ladies and gentlemen of the jury are the sole judges of what period, if any, the plaintiff could reasonably have expected to continue in the automobile business were it not for the defendant's alleged illegal

acts. At the time that Packard failed to renew Webster's contract, Webster's lease on its plant had seven and three-quarter years to run. Accordingly the plaintiff claims that it is entitled to recover damages on the basis that it would have continued in business for a period of at least seven and three-quarter more years. Whether that is so or not is for you to determine. The plaintiff claims that for the balance of the term of the lease it could have anticipated a total net profit of $259, 760, using the same average profits as it had gained during the
1941 years immediately preceding 1952. In addition the plaintiff claims that it sustained a loss during the year in which it closed out its operations, a loss that it would not have sustained if its franchise had not been discontinued and it had been permitted to continue operations as it had done previously. The plaintiff claims that this loss amounted to $24, 900. You have a right, if you see fit, to consider this as an additional item of damage, giving it such weight as you consider proper.

The defendants on the other hand dispute the calculation of profits during the preceding years, that is, years preceding 1952. The defendants claim that all of Mr. Webster's salary as an officer of the company should be deducted from the gross profits, and by so doing the net profits would be reduced considerably. The plaintiff responds by contending that since the Webster Motor Car Company had other interests and activities than just the automotive business, and Mr. Webster devoted his personal attention to all aspects of the company's interests, only a small portion of his salary should be charged to the automotive business, and that is what the certified public accountant has done. It is for you to determine what the fact was and how the matter should be handled.

It is then claimed by the defendants that the average net profits
1942 for the years preceding 1952 are high because the years 1946, 1947 and 1948 were unusual years when there was a seller's market, and that the gross profits of the plaintiff were much greater in those years than they were in 1949, 1950 and 1951, and that according to the

plaintiff's own statement, the plaintiff's profits in 1950 were only $15,000, and that according to the defendant's calculations they were even less. The plaintiff responds that one reason why the profits were down in 1949 and 1950 was the fact that a disastrous fire had been sustained by the plaintiff in its plant, and that therefore those two years were not typical, and that, moreover, beginning in 1951 there was a marked upswing and and increase in profits. All these matters are for you to consider. You are not bound by the figures introduced either by the plaintiff or by the defendants, but you may give these figures such weight as you deem wise and proper. You may use them as a basis to reach a figure by a process of approximation which, in your opinion, would fairly and reasonably compensate the plaintiff for the damages it has sustained, no more, but no less, if you bring in a verdict in favor of the plaintiff.

In conclusion, your verdict should be either for the plaintiff for a specific amount of money, or a verdict in favor of the defendants. As
1943 of course you are aware, your verdict must be reached by unanimous vote. Are there any objections or requests? If so you may come to the bench.

APPENDIX B

Decided April 18, 1957

Mr. Harold L. Smith, with whom Messrs. Robert W. Barker, Louis M. Denit, Jerome G. Shapiro and Richard P. McGrath were on the brief, for appellants in No. 13152 and appellees in No. 13153.

Messrs. William J. Hughes, Jr., and Donald D. Webster, with whom Mr. William E. Leahy was on the briefs, for appellee in No. 13152 and appellant in No. 13153.

Before EDGERTON, Chief Judge, and PRETTYMAN and BAZELON, Circuit Judges.

EDGERTON, Chief Judge: Packard Motor Car Company and two of its officers appeal from a judgement for $570,000 in favor of Webster Motor Car Company, a former Packard dealer in Baltimore, for alleged violation of the Sherman Antitrust Act. 15 U.S.C. Secs. 1, 2, 15. The essential facts are not disputed.

There were formerly four dealers in Packard cars in Baltimore. In 1953 there were three, of which Webster was one. The usual dealer contract in the automobile business, and the contract between Packard and Webster, were for one year, with no option of extension. It was the custom in the business to extend contracts, from year to year, "barring some reason for cancellation." Webster and Packard had extended their contracts from year to year a considerable number of times.

In 1953 Zell Motor Car Company, the largest of the three Baltimore dealers in Packard cars, told Packard that Zell was losing money and would quit unless Packard gave it an exclusive contract. Packard told Zell it would do so, and told Webster and the other Baltimore dealer that their contracts would not be renewed. After Webster protested and threatened suit, Packard offered Webster the usual one-year renewal, but refused to promise more. Packard told Zell, in effect, that this would be Webster's last renewal. Webster declined Packard's offer, quit the business, and brought this suit.

The District Court submitted to the jury the question whether there was an unreasonable restraint of trade, and also whether there was an agreement or attempt to monopolize. The jury found for the plaintiff and awarded $190,000 damages, which the court trebled in accordance with the statute. Motions for judgment notwithstanding the verdict, and for a new trial, were denied. The court held that the jury had "a right to reach the conclusion that an agreement on the part of the manufacturer with one of its own dealers to terminate the franchise of all competitors and to grant to him a monopoly within a certain area, is an agreement in unreasonable restraint of trade, or an agreement to monopolize." Webster Motor Car Company v. Packard Motor Car Co., 135 F. Supp. 4, 9.

We think the defendants were entitled to judgment. We agree substantially with Schwing Motor Co. v. Hudson Sales Co., 138 F. Supp. 899 (D. Md. 1956), aff'd, 239 F. 2d 176 (C.A. 4, 1956).

1. There was no monopoly, or attempt or conspiracy to monopolize, within the meaning of the Sherman Act. The cellophane case, which had not been decided when the present case was tried, makes this clear. The Supreme Court there said: "this power that, let us say, automobile or soft-drink manufacturers have over their trade-marked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product." And the Court held that "In considering what is the relevant market for determining the control of price and competition . . . commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal." The Court accordingly held that, although du Pont produced about 75% of the cellophane sold in this country, there was no monopoly, because "the relevant market" was flexible packaging materials, including such things as glassine, waxed paper, and foil, as well as cellophane, and cellophane accounted for only 17.9% of this market. United States v. du Pont & Co., 351 U.S. 377, 393, 395, 399-400. Since there are other cars "reasonably

interchangeable by consumers for the same purposes" as Packard cars and therefore in competition with Packards, an exclusive contract for marketing Packards does not create a monopoly. And there is no evidence of any attempt or conspiracy to create a monopoly, since there is no evidence of any attempt to get control of the relevant market.

2. There was no contract or conspiracy in restraint of trade within the meaning of the Sherman Act. As the court informed the jury, it has long been clear that only unreasonable restraints of trade are unlawful. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1. When an exclusive dealership "is not part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels, the arrangement has invariably been upheld as a reasonable restraint of trade. In short, the rule was virtually one of per se legality" until the District Court decided the present case.[2] Of Packard's 1600 dealers, 1100 were the only Packard dealers in their cities, some of which were nearly as large as Baltimore, and such a ratio was typical in the automobile industry. The fact that any other dealers in the same product of the same manufacturer are eliminated does not make an exclusive dealership illegal; it is the essential nature of the arrangement. The fact that Zell asked for the arrangement does not make it illegal. Since the immediate object of an exclusive dealership is to protect the dealer from competition in the manufacturer's product, it is likely to be the dealer who asks for it.[3]

The short of it is that a relatively small manufacturer, competing with large manufacturers, thought it advantageous to retain its largest dealer in Baltimore, and could not do so without agreeing to drop its other Baltimore dealers. To penalize the small manufacturer for competing in this way not only fails to promote the policy of the antitrust laws but defeats it.

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2. Handler, Annual Antitrust Review, 11 Record of the Ass'n of the Bar of the City of New York 167, 170 (1956). Fargo Glass & Paint Co. v. Globe American Corp., 201 F. 2d 534 (C.A. 7), cert. denied, 345 U.S. 942 (1953); Barcom Launder Corp. v. Telecoin Corp., 204 F. 2d 91 (C.A. 2), cert. denied, 345 U.S. 994 (1954); United States v. Bausch & Lomb Optical Co., 45 F. Supp. 387, 398-399 (S.D.N.Y.), aff'd, 321 U.S. 707, 719 (1944); Cf. G. & F. Amusement Co. v. Regent Theater Co., 107 F. Supp. 453, aff'd, 210 F. 2d 740 (C.A. 6); Bond Hall Corp. v. General Motors Corp., 124 F. 2d 858 (C.A. 2); Hudson Sales Corp. v. Waldrip, 211 F. 2d 708 (C.A. 5).

3. Handler, supra note 2, at p. 176.

3. Though Packard had formerly expressed an intention not to renew its contract with Webster, Packard offered and Webster refused the usual renewal. That Packard had agreed with Zell not to renew Webster's contract again when the proferred renewal expired is immaterial, not only because the agreement was legal but also because it inflicted no damage.

The judgment in favor of Webster is reversed. Webster's cross-appeal concerning the amount of Webster's attorneys' fee is dismissed as moot.

No. 13152 reversed;
No. 13153 dismissed.

BAZELON, Circuit Judge, dissenting: Webster and Zell were competing Packard automobile dealers in Baltimore. In 1952 Packard served notice of termination of Webster's dealership, but then, after Webster's protest, offered to renew the dealership for only one year without further renewal.

I think the court properly instructed the jury upon the law applicable to conspiracies or combinations in restraint of trade in violation of Sec. 1 of the Sherman Act and that the evidence supports the jury's finding in respect thereto. It is therefore unnecessary to decide whether the determination below of a conspiracy to monopolize in violation of Sec. 2 may also be sustained.

There was evidence that Zell had asked Packard to eliminate Webster as a competing Packard dealer; that Packard had never before considered that one dealer could be adequate representation in Baltimore; that Packard had found Webster to be a satisfactory dealer with a good organization; that there was an "understanding" between Zell and Packard, and that Packard had "agreed" with Zell that Webster's franchise be ended; and that, when Webster balked at his demise and threatened to bring an action for damages, Packard had offered Webster a renewal of its franchise in the usual form for one year, which Packard had agreed with Zell would be a final renewal. As a Packard memorandum put it: "This . . . was reviewed in detail and

agreed to by Mr. Zell."

From this evidence the jury could have found -- as it apparently did -- that Webster's elimination as a dealer resulted not from a unilateral decision by Packard in selecting its customers, but rather from an agreement between Packard and Zell to eliminate Zell's competitor and make Zell the sole distributor of Packard cars in Baltimore; in simple terms, that it was an agreement which amounted to a combination or conspiracy to get rid of Webster. 1/

The "common right" of an individual to engage in a lawful calling was protected against restraints at common law, 2/ is encompassed within the protection of the Fourteenth Amendment 3/ and forms the very basis of the Sherman Act 4/ The purpose of the Act is to protect the individual business man as well as to assure to the consumer the benefits flowing from free competition. Applied to a dealership situation, the Act does not interfere with the manufacturer's right to select his dealers but it does prevent him from combining and conspiring with one not to deal with another 5/

1/ We are not called upon to decide whether Sec. 1 of the Sherman Act applies to a manufacturer who, after a discussion with one dealer, decides to make the latter his exclusive distributor, cutting off all others, for the purpose of improving the manufacturer's competitive position vis-a-vis more powerful manufacturers Cf. Schwing Motor Co. v. Hudson Sales Co., 138 F. Supp. 899, 906 (D. Md 1956), affirmed, _____ F. 2d____ (4th Cir. 1956) That is not this case.

2/ Darcy v Allen, 11 Coke 84b, 77 ENG. REP. 1260 (1576).

3/ Butcher's Union v. Crescent City Co., 111 U.S. 746 (1884), concurring opinions of Mr Justice Field and Mr. Justice Bradley.

4/ Apex Hosiery Co v Leader, 310 U.S. 469, 497-98 (1940).

5/ Even individually conceived refusals to deal may be an element in a violation of Sec. 1 of the Sherman Act. United States v. Bausch & Lomb, 321 U.S. 707, 723 (1944); Federal Trade Comm'n v. Beech-Nut Co., 257 U.S. 441 (1922); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955), at 134; cf. Dr. Miles Medical Co. v. Parks, 220 U.S. 373 (1911).

Schwing Motor Co. v. Hudson Sales Co., 138 F. Supp. 899 (D. Md. 1956), affirmed, _____ F. 2d ____ (4th Cir. 1956), disagrees with the decision here under review. The latter case would limit the manufacturer's right to select his own customers by the requirement that he make no agreement with one to exclude another. Schwing would recognize this limitation only "if the agreement is a horizontal one between competitors, or if the manufacturer dominates the market in the commodity." 138 F. Supp. at 906. In this I think Schwing is wrong. The Supreme Court has held that, even apart from monopolistic effect, a vertical agreement which excludes a competitor of one of the parties from a substantial market violates Sec. 1 of the Sherman Act.[6/]

To avoid the application of the Sherman Act Packard contends that, because Webster rejected the proferred one-year renewal, the jury could not find that Packard refused to deal with Webster. But this contention is not persuasive. The record contains ample evidence from which the jury could have found that the renewal offer was not made in good faith, was prompted by Webster's threat to sue, and resulted from an agreement between Packard and Zell that it would be the last renewal.

6/ See Standard Oil of Calif. v. United States, 337 U.S. 293, 305 (1949), explaining International Salt Co. v. United States, 332 U.S. 392 (1947).

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IN THE

Supreme Court of the United States

October Term, 1957

No. ~~1113~~ 213

THE WEBSTER MOTOR CAR COMPANY,
Petitioner

v.

PACKARD MOTOR CAR COMPANY, ET AL.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM J. HUGHES, JR.
Bowen Building
Washington, D. C.

DONALD D. WEBSTER
3502 Turner Lane
Chevy Chase, Md.
Attorneys for Petitioner

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	4
Reasons for granting the writ	7
Misapplication of the *Colloplate* case	8
Exclusive dealerships are not "virtually *per se* lawful"	12
The *Schwing* case is not in point	20
Conclusion	22
Appendix A: Opinion of the Court of Appeals	23
Appendix B: Judgment of the Court of Appeals	30
Appendix C: Order of Court of Appeals denying petition for rehearing *in banc*	31
Appendix D: Statutes involved	32
Appendix E: Supplementary statement of facts	33

CITATIONS

Cases:

Albert Peck-Barth Co. v. *Mitchell Woodbury Corp.*, 57 F.2d 96 (C.A. 1), *cert. denied*, 286 U.S. 552	17
Alexander's Department Stores v. *Ohrbach's Inc.*, 40 N.Y.S. 2d 631, *rev.* 42 N.Y.S. 2d 703	18
Allen Bradley Co. v. *I.B.E.W. Local No. 3*, 325 U.S. 797	14
American Federation of Tobacco Growers, Inc. v. *Neal*, 183 F.2d 869 (C.A. 4)	17
Arthur v. *Kraft-Phenix Cheese Corp.*, 26 F.Supp. 824 (D.C. Md.)	20
Automatic Canteen Co. v. *F.T.C.*, 334 U.S. 61	16
Bascomb Launder Corp. v. *Telecoin Corp.*, 204 F.2d 331 (C.A. 2), *cert. denied*, 345 U.S. 994	13

PAGE

Board of Trade of the City of Chicago v. *U.S.*, 246 U.S. 231, 238 16
Brosious v. *Pepsi-Cola Co.*, 59 F.Supp. 429 (M.D. Pa.), *aff'd on other grounds*, 155 F.2d 99 (C.A. 3) 22
Caldwell-Clements, Inc. v. *Conran Publishing Corp.*, 130 F.Supp. 362 (S.D.N.Y.) 18
Dr. Miles Medical Co. v. *Parks*, 220 U.S. 373 15
Dublin Distributors, Inc. v. *Edward & John Burke, Ltd.*, 109 F.Supp. 125 (S.D.N.Y.) 22
Fargo Glass & Paint Co. v. *Globe American Corp.*, 201 F.2d 534 (C.A. 7), *cert. denied*, 345 U.S. 942 13
Fashion Originator's Guild v. *F.T.C.*, 312 U.S. 457 18
Fedderson Motors, Inc. v. *Ward*, 180 F.2d 519 (C.A. 10) 22
F.T.C. v. *Beech-Nut Packing Co.*, 257 U.S. 441 15
G & P Amusement Co. v. *Regent Theatre Co.*, 107 F.Supp. 453, *aff'd. per curiam*, 216 F.2d 749 (C.A. 6) 14
Gamco, Inc. v. *Providence Fruit & Produce Building, Inc.*, 194 F.2d 484 (C.A. 1), *cert. denied*, 344 U.S. 817 17
Hudson Sales Corp. v. *Mark Waldrip*, 211 F.2d 268 (C.A. 5), *cert. denied*, 348 U.S. 821 22
International Salt Co. v. *U.S.*, 332 U.S. 392 ..... 10, 16
Interstate Circuit, Inc. v. *U. S.*, 306 U.S. 208 10
Kansas City Star Co. v. *U. S.*, 240 F.2d 643 (C.A. 8) 12
Montague & Co. v. *Lowry*, 193 U.S. 38 18
Paramount Film Distributing Corp. v. *Village Theatre, Inc.*, 228 F.2d 721 (C.A. 10) 16
Parmelee Transportation Co. v. *Keeshin*, 144 F.Supp. 480, 485 (D.C. Ill.) 18
Riedley v. *Hudson Motor Car Co.*, 82 F.Supp. 8 (W.D. Ky.) 22
Schwing Motor Co. v. *Hudson Sales Co.*, 138 F.Supp. 899 (D.C. Md.), *aff'd. per curiam*, 239 F.2d 176 (C.A. 4) 20, 21
Standard Oil of Calif. v. *U. S.*, 337 U.S. 293, 305 16
Standard Oil Co. of New Jersey v. *U. S.*, 221 U.S. 1 14

PAGE

Union Circulation Co. v. *F.T.C.*, 241 F.2d 652 (C.A. 2) 18
U. S. v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C.A. 6) 13
U. S. v. *Bausch & Lomb Optical Co.*, 45 F.Supp. 387 (S.D.N.Y.), *aff'd in part*, 321 U.S. 707 13, 15
U. S. v. *Colgate & Co.*, 250 U.S. 300 3
U. S. v. *Columbia Steel Co.*, 334 U.S. 495 18
U. S. v. *Crescent Amusement Co.*, 323 U.S. 173 10
U. S. v. *Detroit Sheet Metal & Roofing Contractors Association*, 116 F.Supp. 81 (E.D. Mich.) 18
U. S. v. *du Pont & Co.*, 351 U.S. 377 2, 6, 12, 15
U. S. v. *duPont & Co.*, 25 L.Wk. 4343 (June 3, 1957) 3, 7, 16, 21
U. S. v. *Griffith*, 334 U.S. 100 10
U. S. v. *Imperial Chemical Industries, Ltd.*, 105 F.Supp. 215, 245 (S.D.N.Y.) 18
U. S. v. *International Boxing Club*, 150 F.Supp. 397, 419 (S.D.N.Y.) 12
U. S. v. *Klearflax Linen Looms, Inc.*, 63 F.Supp. 32 (D.C. Minn.) 18
U. S. v. *New Orleans Insurance Exchange*, 148 F.Supp. 915, 920 (D.C. La.) 18
U. S. v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 n 59 11
Van Camp & Sons v. *American Can Co.*, 278 U.S. 245 16
William Goldman Theatres, Inc. v. *Loew's, Inc.*, 150 F.2d 738 (C.A. 3), *cert. denied*, 334 U.S. 811 17

Statutes:

Public Law 1026, 84th Cong., 2d Sess. (Aug. 8, 1956) 19

Miscellaneous:

"Antitrust Policy and the Cellophane Case", Turner, Harvard Law Review, December 1956 11
"Automotive News", June 17, 1957, pp. 1, 82-83 18
Hearings before House Committee on Interstate and Foreign Commerce, 84th Cong., 2d Sess. on H.R. 6544; July 6, 1955 18

PAGE

Hearings before House Committee on the Judiciary, 84th Cong., 2d Sess. on H.R. 11360 and S. 3879; July 2, 3, 9 and 10, 1956 19
H. Rept. 2850, 84th Cong., 2d Sess., on S. 3879, July 20, 1956 20
"Manufacturer-Dealer Legislation", 57 Col.L. Rev. 219-238 (Feb. 1957) 19
"Recent Developments: Anti-Trust Exclusive-Car Dealership—Elimination of Competitive Dealer", 2 Howard L. J. 256 (June 1956) 12
Report of Attorney General's National Committee to Study the Antitrust Laws (1955) 14, 15, 22
Senate Doc. 32, 85th Cong., 1st Sess., "The Right To Buy And Its Denial To Small Business," March 1957 18
"Statutory Regulation of Manufacturer-Dealer Relations in the Automobile Industry," 70 Harvard 1239-1257 (May 1957) 19
"The Resurgence of the Exclusive Territorial Distributorship as an Antitrust Problem," 40 Minn.L.Rev. 853 (June 1956) 12

IN THE

Supreme Court of the United States

October Term, 1956

No.

THE WEBSTER MOTOR CAR COMPANY,
Petitioner

v.

PACKARD MOTOR CAR COMPANY, ET AL
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Webster Motor Car Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on April 18, 1957.

OPINIONS BELOW

The judgment of the U. S. District Court for the District of Columbia in favor of Webster for $570,000 was entered without opinion on June 21, 1955 (R. 118). The ruling of the District Court denying the motion of Packard Motor Car Company for a directed verdict at the close of Webster's evidence is unreported but appears at R. 466. The District Court's ruling denying Packard's motion for a directed verdict at the close of all the evidence is likewise unreported but appears at R. 837. The opinion of the District Court denying Packard's motions for judg-

ment n.o.v. and for a new trial is reported at 135 F. Supp. 4, and is printed at R. 136. The majority and dissenting opinions of the Court of Appeals below reversing the District Court judgment are unreported but are printed as Appendix A, *infra*, p. 23.

JURISDICTION

The Court of Appeals' judgment was entered on April 18, 1957 (App. B, *infra*, p. 30). A timely motion for rehearing *in banc* was denied by a divided court on May 16, 1957 (App. C, *infra*, p. 31). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The jury found that Packard, an automobile manufacturer, had violated the Sherman Act by conspiring with Zell, its largest dealer in Baltimore, that Packard would terminate the franchises of its two other Baltimore dealers. The Court of Appeals, one judge dissenting, reversed the judgment for $570,000 awarded upon the jury's verdict. The questions presented are:

1. Whether an agreement or conspiracy between a manufacturer and its largest dealer, at the instigation of the latter, to eliminate the dealer's competitors, for the purpose of giving the dealer a monopoly in the sale of the manufacturer's product, is immunized as a matter of law from the prohibitions of sections 1 and 2 of the Sherman Act on the theory that the manufacturer might have unilaterally decided to grant an exclusive dealership.

2. Whether the doctrine of the *Cellophane* case, which defined the relevant market for purposes of monopolization within the meaning of section 2 of the Sherman Act, dictates the relevant market as a matter of law for agreements and conspiracies violative of section 1 of the Sherman Act and of con-

spiracies to monopolize violative of section 2 of the Sherman Act. Particularly, in the present conspiracy case under sections 1 and 2 of the Sherman Act, must the relevant market *as a matter of law* embrace competition in the sale of *all* automobiles, thereby precluding a jury from finding that the relevant market was confined to competition in the sale of Packard automobiles?

3. As the dissent below points out, the majority limits sections 1 and 2 of the Sherman Act to horizontal conspiracies between dealers, ruling out as nonactionable a vertical conspiracy between a manufacturer and a dealer to eliminate competition between dealers. Is this contrary, in principle, to this Court's decision in the *du Pont-General Motors* case (decided June 3 last) and other decisions?

4. Whether an automobile manufacturer's right to select those with whom it will deal (*U.S.* v. *Colgate & Co.*, 250 U.S. 300) is so absolute as to immunize the manufacturer's conspiracy with a preferred dealer to eliminate the dealer's competitors.

STATUTES INVOLVED

The pertinent provisions of the Sherman Act (15 U.S.C. 1, 2) and Section 4 of the Clayton Act (15 U.S.C. 15) appear in Appendix D, *infra*, p. 32.

STATEMENT

On February 13, 1953 Webster Motor Car Company brought suit under 15 U.S.C. 15 against Packard Motor Car Co. and Zell Motor Car Co. of Baltimore, Maryland, to recover treble the damages caused Webster by defendant's conspiracy in violation of sections 1 and 2 of the Sherman Act. Valid service could not be effected on Zell in the District of Columbia.

Webster's complaint alleged and the evidence warranted the jury in finding as follows:[1] For some years prior to the Spring of 1952 there were three franchised Packard dealers in the metropolitan Baltimore area (including Webster and Zell). All were acceptable to Packard and were making money. Their competition with each other was satisfactory to Packard and of great benefit to the public. In order to make more money through complete control of trade-in allowances and service charges, Zell threatened to give up his dealership unless Packard terminated the dealerships of his competitors. Packard, without seeking to dissuade Zell, or conferring with Webster or other persons as to alternatives, secretly agreed to do, and did, what Zell requested, thus destroying his competitors to the great injury of the Baltimore consuming public. Packard admitted that a Packard owner got a better trade-in allowance from a Packard dealer than from a dealer in some other make of car, for instance a Buick dealer (R. 624).

Packard at first in its answer denied any such secret agreement with Zell. However, at the trial, the agreement and conspiracy were overwhelmingly proved by Packard's own witnesses and its documents. Packard then shifted its defense to a claim that its decision to make Zell its sole Baltimore Packard dealer was a lawful business decision. The court left this issue of conspiracy or valid independent business decision to the jury (R. 940-4) and the jury found in Webster's favor.

The court also left to the jury the question of which competition was more important to the public,—the competition between the Baltimore Packard dealers as Webster's evidence showed; or, as Packard claimed, the competition between Packard and other makes of cars (R. 944-5). Here, too, the jury found for Webster.

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[1] A detailed summary of the evidence with record references appears as Appendix E, *infra*, p. 33.

Also left to the jury was the question whether, after notice of suit, Packard's offer to renew Webster's franchise for a year was made in good faith or as part of a further secret agreement with Zell to terminate Webster at the end of the year finally and irrevocably (R. 940-1, 945). The jury found for Webster.

The following significant facts were stated by Judge Bazelon in the dissenting opinion below and not questioned in the majority opinion (App. A, *infra*, p. 27).

> "There was evidence that Zell had asked Packard to eliminate Webster as a competing Packard dealer; that Packard had never before considered that one dealer could be adequate representation in Baltimore; that Packard had found Webster to be a satisfactory dealer with a good organization; that there was an 'understanding' between Zell and Packard, and that Packard had 'agreed' with Zell that Webster's franchise be ended; and that, when Webster balked at his demise and threatened to bring an action for damages, Packard had offered Webster a renewal of its franchise in the usual form for one year, which Packard had agreed with Zell would be a final renewal."

The District Court denied Packard's motion for a directed verdict at the close of Webster's evidence by a ruling at R. 466. It denied a similar motion at the close of all evidence by a ruling at R. 837. It submitted the case to the jury under the charge which appears at R. 936-949. The jury returned a verdict of $190,000 for Webster which the Court trebled and to which it added an attorney's fee. On October 25, 1955 the District Court denied Packard's motions for judgment n.o.v. and for new trial, R. 136-148. Packard appealed and Webster cross-appealed as to attorney's fees. A divided Court of Appeals, Bazelon J., dissenting, on April 18, 1957 reversed the trial court judgment and dismissed Webster's cross-appeal as moot (App. A, *infra*, p. 23). A timely motion for rehearing *in banc* was denied by a divided court on May 16, 1957 (App. C, *infra*, p. 31).

The majority below held that it was error to submit the case to the jury, and that Packard was entitled to judgment as a matter of law. The majority construed this Court's decision in *U.S. v. du Pont & Co.*, 351 U.S. 377, (the *Cellophane* case) as requiring a holding *as a matter of law* that Packard automobiles are "reasonably interchangeable by consumers" with other makes of automobiles; and that therefore it was error to permit the jury to decide whether, as Webster's evidence showed, there was a "Packard market" in Baltimore in which competition between Packard dealers was beneficial to the public, or whether, as Packard contended, the only market of interest to the public there was the market for all makes of cars.

On the premise that under the *Cellophane* case there is always, as a matter of law, effective competition between different makes of cars in the "relevant market", the majority below concluded that there can be no unreasonable restrait of commerce, nor an unlawful conspiracy to monopolize, by the establishment in any way or for any reason or motive whatever of an exclusive dealership in any one make—in this case Packards. In such circumstances, the Court declared, exclusive dealerships are "*per se* lawful", even when their establishment requires the destruction of the businesses of two competing dealers and the elimination of the benefit to the public from their competition for Packard business.

In his dissent Judge Bazelon expressed his belief that the District Judge's instructions were correct and that the evidence supported the jury finding thereunder of an unreasonable restraint of trade in violation of section 1 of the Sherman Act. He concluded that it was therefore unnecessary to consider whether under the Sec. 2 count Webster had made out a case from which the jury could have found that Packard had conspired with Zell to enable him to monopolize the Baltimore Packard market.

He also concluded that the jury was warranted in finding that Webster's elimination resulted "not from a unilateral decision by Packard in selecting its customers" [nor from a decision to establish an exclusive dealership in order to improve the manufacturer's competitive position vis-a-vis other manufacturers], "but rather from an agreement between Packard and Zell which amounted to a combination or conspiracy to get rid of Webster." The purpose of the Sherman Act, he said "is to protect the individual businessman as well as to assure to the consumer the benefits flowing from free competition. Applied to a dealership situation, the Act does not interfere with the manufacturer's right to select his dealers but it does prevent him from combining and conspiring with one not to deal with another." The fact that the agreement was vertical rather than horizontal did not, he said, call for a different conclusion.

REASONS FOR GRANTING THE WRIT

1. The court below has distorted this Court's decision in the *Cellophane* case into a holding *as a matter of law* that there can be no "Packard" market in automobiles, i.e. that the "relevant market" under *Cellophane* is the market for all makes of automobiles. This is contrary to the holding in *Cellophane* that the "relevant market" is always a matter of fact. The jury held on all the evidence and under proper instructions that there was, *in fact*, a "Packard market," which was unreasonably restrained by Packard to the damage of the public. Either the decision below means that *as a matter of law* there is no violation of law herein or the court invades the province of the jury in violation of the 7th Amendment.

2. Likewise the court below in effect held that a vertical conspiracy between an automobile manufacturer and a dealer was non-actionable. This is contrary to this Court's decision in *U.S. v. du Pont & Co.*, 25 L. Wk. 4343 (the *du Pont-General Motors* case) rendered June 3, last.

that a vertical conspiracy may be actionable depending on the facts.

3. The decision below extends this Court's decision in the *Cellophane* case into the area of attempts and conspiracies. These were expressly excepted by the Court in the *Cellophane* decision. The absurd rule now operating in the District of Columbia is that no matter how hard the conspirators try to restrain or monopolize a *part* of interstate commerce (i.e. the Packard part), they do not violate the Sherman Act unless their efforts are directed at the whole (i.e. the market for *all* automobiles).

4. Contrary to numerous decisions of this Court and of Federal Courts of Appeal the court below has invented a rule of "*virtual per se legality*" as to exclusive territorial dealerships—without regard to how or why they are achieved or what harm they accomplish.

Misapplication of the Cellophane Case

All the opinions in the *Cellophane* case hold that "relevant market" is a question of fact, 351 U.S. 377 at 381, 387, 394-5, 404, 413, 415-424. The majority below, however, treat the matter as a question of law. This was because they misconstrued a statement in Mr. Justice Reed's opinion (p. 939) as to automobiles and soft drinks, as though it were this Court's judgment that there cannot be a section 2 violation with respect to any particular make of automobile.

In the present case, the jury on substantial evidence and under specific instructions found as a fact that competition between the Baltimore Packard dealers was more important to the public than the competition between Packards and other makes of cars. The pertinent portions of the judge's charge (R. 944-5) make this clear.[2]

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[2] "Coming now to the third element, namely, that the alleged unlawful conspiracy or agreement adversely affected

The majority below erroneously held that the *Cellophane* case invalidated as a matter of law the jury's decision that there was an attempt or conspiracy by Zell, aided and abetted by Packard, to monopolize. The majority said, "And there is no evidence of any attempt or conspiracy to create a monopoly, *since there is no evidence of any attempt to get control of the relevant market,*" i.e., the market for all makes of cars. (Emphasis supplied.) Coming after the majority's erroneous ruling that the *Cellophane* case requires it to hold as a matter of law that there was "reasonable interchangeability" between Packards and other automobiles, this statement amounts to a holding that where a manufacturer cannot be convicted under section 2 of a one-concern monopoly of a particular commodity because it is in competition with

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the interests of the public, the plaintiff offered evidence tending to show that the public interest is promoted by competition among dealers in the same make of cars, since by such competition a prospective customer may choose as between dealers in an effort to get the best possible terms on such matters as allowances for used cars, better service, and the like. The defendant on the other hand claims that the only real competition is as between different makes of cars, and not between dealers in the same make of car and that, therefore, elimination or restraint of competition between dealers in the same make of car does not affect competition, and does not constitute a restraint of trade. What the fact is is for you to determine, ladies and gentlemen of the jury."

The Trial Judge also charged the jury that Webster could not recover unless the jury found an "unlawful conspiracy or agreement (which) adversely affected the interests of the public." (R. 942-3).

In the *Cellophane* case, duPont expressly denied the existence of a cellophane market. Packard never denied the existence of a Baltimore Packard market, but merely denied that it had conspired with Zell to enable him to monopolize it (R. 16-17 and 43; see also R. 2 and 31; 6-7 and 36; 15 and 42-43; 21 and 46; 28-29 and 50-51). Having failed to persuade the jury that it did not conspire with Zell to enable him to monopolize the Baltimore Packard market, Packard then persuaded a divided Court of Appeals to stretch the relevant market concept of the *Cellophane* case and rule that as a matter of law there is no such market.

other commodities, it is impossible to establish his violation of section 2 through an *attempt* or *conspiracy* with a preferred dealer to eliminate the dealer's competitors so that he can monopolize the market for the commodity.

The present case does not involve a section 2 charge of one-company monopoly. As Judge Bazelon points out (App. A, *infra*, p. 23), Webster's case is so strong under section 1 that its section 2 case need never be reached. To the extent that Webster's case depends on section 2, it is on the basis of an unreasonable and illegal conspiracy to eliminate multiple competing Packard dealerships theretofore established by and wholly satisfactory to Packard and of great value to the public in order that Zell might monopolize the Baltimore Packard market.

The majority decision below improperly extends the *Cellophane* decision to conspiracies and attempts to monopolize. These areas were expressly excluded by this Court from its decision there. 351 U.S. 377, at 379 and 381.

The majority decision below in effect treats the *Cellophane* case as overruling a long line of this Court's earlier decisions affirming convictions for conspiracies or attempts to monopolize in cases involving only parts of a market or parts of interstate commerce.[3] That this Court had no such intention is clear from Mr. Justice Reed's citations in support of his statement at p. 395, that "illegal monopolies under section 2 may well exist over limited products in narrow fields where competition is eliminated;" and from his comments and citations at pp. 386-7 with respect to the "Rule of Reason" in antitrust law.

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[3] *Interstate Circuit, Inc.* v. *U.S.*, 306 U.S. 208; *U.S.* v. *Crescent Amusement Co.*, 323 U.S. 173; *U.S.* v. *Griffith*, 334 U.S. 100. See also *International Salt Co.* v. *U.S.*, 332 U.S. 392, 396, where it is said to be "unreasonable *per se* to foreclose competitors from any substantial market."

In discussing various matters relating to the relevant market problem, Donald F. Turner, Professor of Antitrust Law, Harvard Law School, in an article appearing in the December 1956 *Harvard Law Review*, entitled "Antitrust Policy and the Cellophane Case," said (p. 305):

> "If defendants are attempting to drive someone out of the market by foul means rather than fair there is ample warrant for not resorting to any refined analysis as to whether the intent is to drive everyone out or whether, having taken over all of the production of a particular commodity, the defendants would still face effective competition from substitutes. Coercive conduct is analogous to price fixing, attempts at which are illegal . . . 'and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 n 59 (1940).'"

He added (p. 307):

> "It is reasonable to disregard any refined concept of market in attempt and conspiracy cases because the conduct involved is so egregious that it may be appropriately condemned *per se*."

This reasoning is applicable to the instant case because Zell complained *only* of the competition of the other Packard dealers in metropolitan Baltimore (R. 440-2, 315-16). There is no evidence that he complained of or was in the least bit concerned about the competition of dealers handling other makes of cars. Since the conspirators themselves thus carefully staked out the area Zell was to monopolize—the metropolitan Baltimore Packard market—and since the jury, too, found this to be the relevant area, there was no call for the Court below to re-survey the market. The most it should have done was to determine whether there was credible evidence to support the jury's finding.

For an excellent discussion of the lack of cross-elasticity between the various makes of automobiles, see "The

Resurgence of the Exclusive Territorial Distributorship as an Antitrust Problem," 40 Minn. L. Rev. 853 (June 1956), citing with approval the District Court's handling of the instant case. Also approving the District Court decision in the present case: "Recent Developments; Anti-Trust—Exclusive Car Dealership—Elimination of Competitive Dealer," 2 Howard Law Journal 256 (June 1956).

Since the Court below considered all makes of automobiles to be in the "relevant market," it probably would have held that "championship fights" are only a part of the relevant boxing market, thus conflicting squarely with the recent decision in *U.S.* v. *International Boxing Club*, 150 F.Supp. 397, 419 (S.D.NY). In the same way the decision below conflicts with *Kansas City Star Co.* v. *U.S.*, 240 F. 2d 643 (C.A. 8).

The misinterpretation of the *Cellophane* decision, and its extension into areas excluded from that decision introduces dangerous and undesirable doctrines into an important area of antitrust law.

Exclusive Dealerships Are Not "Virtually Per Se Lawful"

The right of a manufacturer to select those with whom it will deal is an important right. In the past, when a controversy arose between a manufacturer, acting independently in its own interest, and one of its dealers, the courts usually found for the manufacturer, emphasizing the manufacturer's right to determine how it should market its product. Thus dealers have learned that they must conduct their business so as to please the manufacturer on whom their business lives depend.

Now, if the decision below stands, dealers also will have to conduct their businesses so as not to offend their fellow dealers—especially those who are larger. They are faced with the dilemma that they may be lawfully cancelled by the manufacturer if they are not vigorous

enough to satisfy him, but if they are that vigorous a large dealer may with impunity persuade the manufacturer to get rid of them.

The decision below is an open invitation, with a grant of complete antitrust immunity, to every large, high-overhead dealer selling a product which is in some competition with somewhat similar products, and who is tired of competing with smaller, lower-overhead and frequently more efficient dealers, to do as Zell did and force the manufacturer to boycott the competing dealers by threatening to quit if he refuses.

No court has ever before announced the doctrine that exclusive dealerships are "virtually *per se legal*."[4] This pronouncement conflicts with the following authorities dealing expressly with the tests which must be applied in determining whether an exclusive dealership is lawful or unlawful:

United States v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C.A. 6)

United States v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387 (S.D.N.Y.), *aff'd in part*, 321 U.S. 707

Fargo Glass & Paint Co. v. *Globe American Corp.*, 201 F. 2d 534 (C.A. 7), *cert. denied*, 345 U.S. 942

Bascomb Launder Corp. v. *Telecoin Corp.*,[5] 204 F. 2d 331 (C.A. 2); *cert. denied*, 345 U.S. 994

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[4] The idea apparently came from a speech by Professor Milton Handler, cited and quoted from with approval by the majority below (App. A, *infra*, p. 26):

> "When an exclusive dealership 'is not part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels, the arrangement has invariably been upheld as a reasonable restraint of trade. In short, the rule was virtually one of *per se* legality' until the District Court decided the present case."

[5] In the *Bascomb Launder Corp.* case, Judge Rifkind's elaborate

All these decisions regard an exclusive dealership as neither *per se* lawful nor *per se* unlawful, and hold that its place within or without the Sherman Act depends on whether, on the facts of each case as measured by the Rule of Reason laid down in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, the restraint imposed is reasonable or unreasonable. Cf. *G & P Amusement Co. v. Regent Theatre Co.*, 107 F. Supp. 453, *aff'd per curiam*, 216 F. 2d 749 (C.A. 6). Certainly exclusive dealerships should not be held lawful when set up by collaboration to eliminate a preferred dealer's competitors. See pp. 27-9, 132-7 and 327-8 of the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955).[6]

The trial court instructed the jury that the antitrust laws prohibit only such restraints of commerce as are unreasonable; that business concerns have a right to select their customers and to prefer one over another, provided this right is exercised without ulterior motives.[7]

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exclusive dealership analysis in the *Bausch & Lomb* case was paraphrased as follows:

> If there is no monopoly, the restraint is not unreasonable if it is
>
> (a) ancillary to a reasonable main purpose, and
>
> (b) fairly protective of the exclusive dealer's interests but not so large as to interfere with the interests of the public.

[6] At p. 29: "In accord with this reasoning, the Committee concludes that where an exclusive dealership forms part of an attempt to monopolize prohibited by section 2, or the lesser degree of unreasonable restraint prohibited by section 1, it should be held a violation. On the other hand, where an exclusive dealership is merely an ancillary restraint, reasonably necessary to protect the parties' main lawful business purposes, such a dealership should be upheld where its effect is no unreasonably to foreclose competition from the dealer's market." At p. 137: "However this Committee subscribes to vigorous condemnation of concerted and conspiratorial refusals to deal." See also p. 327-8.

[7] Cf. *Allen Bradley Co. v. I.B.E.W. Local No. 3*, 325 U.S. 797, where a labor union was found guilty of violating sections 1 and 2 of the Sherman Act when it used its power to aid a businessman to accomplish ends prohibited by the Act.

free from compulsion and without agreements with others that tend to unreasonably restrain commerce, and that the jury was to decide whether there was such a prohibited agreement between Zell and Packard or whether Packard acted "in the exercise of permissible business judgment and discretion." (R. 940, 943, 944).* The majority below did not question the correctness of the instructions. It held that there was no case for the jury because under the *Cellophane* decision there was no conspiracy to eliminate competition between dealers in *all* makes of cars in Baltimore and hence it was immaterial that Zell asked for his monopoly and his competitors were destroyed.

It is clear that it would have been *unlawful per se* if the competing Baltimore Packard dealers had agreed horizontally among themselves to fix prices in order to enhance their profits through non-competitive dealings. Yet under the majority decision, accomplishment of exactly the same kind of monopolistic price-fixing powers is declared *lawful per se* because it was brought about through a plan suggested by a powerful dealer and acquiesced in and implemented by the manufacturer.

The invalidity of such a distinction between horizontal and vertical conspiracies was pointed out in Judge Bazelon's dissent (App. A, *infra*, p. 29):

> "The Supreme Court has held that, even apart from monopolistic effect, a *vertical* agreement which excludes a competitor of one of the parties from a

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*As Judge Bazelon pointed out in his dissent (App. A, *infra*, p. 28), ". . . the jury could have found as it apparently did, . . . that it was an agreement which amounted to a combination or conspiracy to get rid of Webster." He then pointed out that even individually conceived refusals to deal may be an element in violation of Sec. 1, citing *U.S.* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707; *F.T.C.* v. *Beech-Nut Co.*, 257 U.S. 441; the Report of the Attorney General's National Committee, p. 134; and cf. *Dr. Miles Medical Co.* v. *Parks*, 220 U.S. 373 (1911).

substantial market violates Sec. 1 of the Sherman Act. See *Standard Oil of Calif. v. United States*, 337 U.S. 293, 305 (1949), explaining *International Salt Co. v. United States*, 332 U.S. 392 (1947).[9]

Admittedly if the decision below stands that exclusive dealerships are *per se* lawful simply because they relate to articles which are in competition with other somewhat similar trade-marked articles, a very knotty and bothersome antitrust problem will have been greatly simplified. However, the risk involved in resorting to such a shortcut and thus avoiding the expense and difficulty of such lengthy and hotly-disputed jury trials as the present case is twofold: a body of important antitrust principles, carefully laid down by prior cases, one at a time, upon the Rule of Reason itself, will be toppled; and gross injustice will be worked as in the present case. In short, rules of *per se* legality or *per se* illegality simplify antitrust problems but risk undermining the Rule of Reason itself. Cf. *Board of Trade of Chicago v. U.S.*, 246 U.S. 231, 238.

The decision below squarely conflicts with a recent unanimous decision of the Tenth Circuit which cites with approval the District Court's decision in the present case *Paramount Film Distributing Corp. v. Village Theater, Inc.*, 228 F. 2d 721. In an opinion by Chief Judge Phillips that Court held that a jury question is presented under Sec. 1 in cases like the present even though the conspiracy be vertical rather than horizontal.[10]

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[9] The restraints of competition which are outlawed by Sec. 2 of the Robinson-Patman Act are always the result of vertical agreements. See *Van Camp & Sons v. American Can Co.*, 278 U.S. 245; *Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61; cf. *U.S. v. du Pont & Co.*, 25 L.Wk. 4343, decided June 3, 1957 (*General Motors* case).

[10] In discussing the alleged conspiracy to restrain unduly interstate commerce in the showing of first-run pictures in the Salt Lake City area, Chief Judge Phillips said (p. 726): "So, in the

Likewise the majority's conclusion that such exclusive dealerships are *per se* legal conflicts with the following cases:

Albert Pick-Barth Co. v. Mitchell Woodbury Corp.,[11] 57 F. 2d 96 (C.A. 1), *cert. denied*, 286 U.S. 552

William Goldman Theaters, Inc. v. Loew's, Inc.,[12] 150 F. 2d 738 (C.A. 3), *cert. denied*, 334 U.S. 811

Gamco, Inc. v. Providence Fruit & Produce Building, Inc., 194 F. 2d 484 (C.A. 1), *cert. denied*, 344 U.S. 817

American Federation of Tobacco Growers, Inc. v. Neal,[13] 183 F. 2d 869 (C.A. 4)

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instant case, if Paramount Film entered into an agreement, express or implied, with United and Intermountain to favor Intermountain in the distribution of first-run pictures and to deny the Villa Theater the right to bid for first-run pictures and to show day and date pictures, for the purpose of suppressing the competition of the Villa Theater with Intermountain and to unreasonably restrain trade or commerce in first-run pictures in the Salt Lake City area, such agreement was unlawful and actionable."

[11] At p. 102 the court said: "If a conspiracy is proven, the purpose or intent of which is by unfair means to eliminate a competitor in interstate trade and thereby suppress competition such a conspiracy, we think it is a violation of Section 1 of the Sherman Act. . . ."

[12] At p. 742-3 the court said: "Defendants urge us to recognize the rule 'long recognized' of a trader 'free to exercise his own independent discretion as to the parties with whom he will deal.' That doctrine has deep roots in our past. But like all postulates it has its limitations. . . . Plaintiff, as the mere lessee of a theater, has no right to demand defendants' products. But, plaintiff does have the right to have its business protected if there is concert of action directed at plaintiff which results in its removal from competition."

[13] At p. 873 the Court said: "As to the contention that the restraint of trade here involved [defendants had refused to allot plaintiff Danville tobacco market selling time] was a reasonable one, it is a sufficient answer that the effect of the action was to exclude a competitor from a substantial market in interstate commerce; and it is well settled that such exclusion is unreasonable *per se*."

Conflicting in varying degrees with the majority below: *Montague & Co. v. Lowry*, 193 U.S. 38; *Fashion Originator's Guild v. F.T.C.*, 312 U.S. 457; *U.S. v. Columbia Steel Co.*, 334 U.S. 495; *Union Circulation Co. v. F.T.C.*, 241 F. 2d 652 (C.A. 2); *U.S. v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D.C. Minn.); *U.S. v. Imperial Chemical Industries, Ltd.*, 105 F. Supp. 215, 245 (S.D.N.Y.); *U.S. v. Detroit Sheet Metal & Roofing Contractors Association*, 116 F. Supp. 81 (E.D. Mich.); *Caldwell-Clements, Inc. v. Cuban Publishing Corp.*, 130 F. Supp. 362 (S.D.N.Y.); *Parmelee Transportation Co. v. Keeshin*, 144 F. Supp. 480, 485 (D.C. Ill.); *U.S. v. New Orleans Insurance Exchange*, 148 F. Supp. 915, 920 (D.C. La.). In particular note the serious conflict between the majority below and the courts of the State of New York: *Alexander's Department Stores v. Ohrbach's, Inc.*, 40 N.Y.S. 2d 631, *rev.* 42 N.Y.S. 2d 703.

Although others have done so, Webster does not contend that an automobile manufacturer, *acting independently and free from compulsion*, must sell to all who are able and willing to meet the terms of sale.[14] Nor does Webster contend that an automobile manufacturer, acting independently and free from compulsion, cannot give one dealer territorial security from the competition of others selling the same car,—although the Department of Justice and the Federal Trade Commission seem to take this position.[15] Webster does not contend that an automobile

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[14] Senate Doc. 32, 85th Cong., 1st Sess., "The Right To Buy And Its Denial To Small Business," March 1957.

[15] H.R. 6544, 84th Cong., 2d Sess, provided that it would not be a violation of the Sherman Act for an automobile manufacturer to insert in his contracts with dealers whose franchises are limited to particular areas a requirement that, if they sold to a person living in the area of another dealer, they pay a stated amount to the other dealer. The Department of Justice, F.T.C. & Bureau of the Budget opposed the bill on the ground that the strict division of territory which would be implicit in such contracts is contrary to the broad competitive objectives of the Sherman Act. Hearings before the House Committee on Interstate and Foreign Commerce, July 6, 1955, pp. 8-9.

manufacturer is liable to a dealer for damages caused by the manufacturer's coercing or intimidating the dealer in bad faith. Congress, in passing Public Law 1026, 84th Cong., 2d Sess. (Aug. 8, 1956), has recently tried to outlaw such practice.[16]

The only limit which Webster urges upon an automobile manufacturer's right to refuse to deal is this: If the manufacturer has been selling to numerous competing dealers in a metropolitan area where there is plenty of business and all of the dealers are profiting, and if the manufacturer is pleased with all of the dealers and has

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[16] This statute, though untested, seems to make automobile manufacturers liable to their dealers for the damages caused the dealers by the manufacturers' coercion and intimidation. Doubts as to the statute's wisdom have been expressed. See "Manufacturer-Dealer Legislation," 57 Col. L. Rev. 219-238 (Feb. 1957). Questions as to its enforceability have been raised. See "Statutory Regulation of Manufacturer-Dealer Relationships in the Automobile Industry," 70 Harvard L. Rev. 1239-1257 (May 1957). Actually the statute deals only with a very narrow segment of automobile manufacturer/dealer problems since its attempts to cover only those unsubtle and crude acts of coercion and intimidation.

One thing is certain about this new law: it will not protect a dealer in Webster's position who is neither "coerced" or "intimidated" but instead is struck down silently—without threat, complaint or warning of any kind—because of a larger dealer's threat to quit unless given monopoly power over the product.

Before passing this statute, Congress was told by the Department of Justice of Webster's District Court recovery. In commenting on certain amendments which he suggested be made (and which were made) to the bill under consideration, the Department of Justice witness said:

> "So amended the bill would supplement existing antitrust remedies a dealer may have against a manufacturer who conspires with another dealer to drive him out of business. And I refer to the *Webster Motor* case. That is the case where a dealer collected $190,000 trebled or almost $600,000 from a manufacturer who conspired with another dealer in the area to eliminate him. So antitrust at present may provide some remedy." (Hearings before the House Committee on the Judiciary, 84th Cong., 2d Sess., on H. R. 11360 and S. 3879; July 2, 3, 9 and 10, 1956; at p. 265.)

never thought of stopping its sales to any, it violates the Sherman Act if it yields to the threat of one dealer to quit unless it stops selling to the others in order to enable the preferred dealer to monopolize the market in the manufacturer's product.

Many important American manufacturers (e.g., RCA, John Deere, ESSO, General Electric, Chevrolet, Goodyear, etc.) market their products through competing independent dealers having large capital investments.[17] To uphold the decision below will do great injury to efforts to enforce the antitrust laws, and will open the doors to all sorts of undesirable practices by large dealers who, as in the present case, use their power to force destruction of competing dealers for selfish reasons and to the injury of the public.

The Schwing Case Is Not In Point

The majority opinion below places great reliance on *Schwing Motor Co.* v. *Hudson Sales Co.*, 138 F.Supp. 899 (D.C. Md), *aff'd per curiam*,, 239 F. 2d 176 (C.A. 4). Along with Judge Bazelon we believe that *Schwing* was wrongly decided[18] but whether it was or not is not con-

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[17] The average capital investment of the forty thousand new car dealers in this country is $118,000. See H. Rept. 2850, 84th Cong., 2d Sess., on S. 3879, July 20, 1956.

[18] The Maryland District Court held controlling Judge Chestnut's decision in *Arthur* v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 (D.C.Md.). There Arthur, a Baltimore wholesale food broker, sued for treble damages allegedly caused by Kraft's refusal to continue to sell to him. Arthur alleged *only* that Kraft conspired with its officers to force him out of business if he refused to buy out another distributor (Carpel) for $10,000 or to sell his own Kraft business to Carpel for $15,000. Unlike the basic purpose of the Packard-Zell conspiracy, i.e., to prevent the other Baltimore Packard dealers from competing with Zell, the Court said (p. 828):

> "There is nothing in the alleged facts to show that the motive of the defendant was to restrain trade or lessen competition and certainly nothing to show that the alleged unreasonable demand on the plaintiff could possibly have the

trolling here." There the Maryland District Court recognized that that case differed from *Webster* in certain critical respects by saying of the instant case at p. 905-6: "Packard gave Zell an exclusive contract in the Baltimore area and eliminated all rival dealers". In *Schwing*, in addition to Bankert (Zell's counterpart), there were two other Hudson dealers left in the Baltimore area after Schwing was eliminated The Maryland District Court said (p. 904):

> "It is not alleged that the public could not have bought as many Hudson automobiles as it wishes, either from Bankert *or from the two other Hudson dealers in the Baltimore metropolitan area* . . . or even that it was unable to buy *at competitive prices* all of the *Hudson* automobiles that it wishes to buy." (emphasis supplied)

Schwing does not involve the establishment of an exclusive territorial dealership and therefore does not justify the reliance placed upon it by the majority below. In affirming *Schwing per curiam* the U. S. Court of Appeals for the Fourth Circuit placed great emphasis on the fact that the conspiracy alleged was vertical not horizontal and hence immunized. In view of the decision of this Court in *U.S.* v. *du Pont & Co.*, 25 L. Wk. 4343, June 3, 1957, it is clear this reasoning is invalid. None of the

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effect of lessening competition, or of raising prices or even maintaining prices . . . For all that the declaration alleges the discontinuance by the defendant of sales to plaintiff may have been accompanied by the appointment of one or more distributors; and the public's opportunity to buy the defendant's product may have been increased rather than lessened."

In contrast to the fact that Zell, not Packard, conceived the scheme here, there Carpel was an innocent bystander (pp. 829-30): ". . . rather a passive object of the conspiracy than an actor therein. Certainly it is not alleged that he did anything in furtherance of a conspiracy."

other cases relied on by Packard supported the doctrine that exclusive dealerships are "virtually *per se* legal".[19]

Contrary to the impression given by the majority opinion below that in most large metropolitan areas in 1952 there was only *one* Packard dealer (see App. A, *infra*, p. 26), the fact is that during that year there were an average of *twelve* competing Packard dealers in each of the ten most populous cities. See App. E, *infra*, p. 38. Webster called this error to the attention of the Court below (Petition for Rehearing *in banc*, p. —).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the present petition for certiorari be granted.

WILLIAM J. HUGHES, JR.
Bowen Building
Washington, D. C.

DONALD D. WEBSTER
3502 Turner Lane
Chevy Chase, Md.
Attorneys for Petitioner

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[19] Of the following cases relied on by Packard, the Report of the Attorney General's National Committee to Study the Antitrust Laws, p. 136, ftn. 28, states that they constitute examples of "buyers cut-off from supplies *for failure to adhere to the seller's distribution policy. . .*" (emphasis supplied), which is in no way involved in the instant case: *Brosious* v. *Pepsi-Cola Co.*, 59 F. Supp. 429, (M.D.Pa.), *aff'd on other grounds*, 155 F.2d 99 (C.A. 3); *Feddersen Motors, Inc.* v. *Ward*, 180 F.2d 519 (C.A. 10); *Hudson Sales Corp.* v. *Mark Waldrip*, 211 F.2d 268, 273 (C.A. 5), *cert. denied*, 348 U.S. 821; *Riedly* v. *Hudson Motor Car Co.*, 82 F.Supp. 8 (W.D.Ky.); *Dublin Distributors, Inc.* v. *Edward & John Burke, Ltd.*, 109 F.Supp. 125 (S.D.N.Y.).

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13152

PACKARD MOTOR CAR COMPANY, *et al.*, APPELLANTS

v.

THE WEBSTER MOTOR CAR COMPANY, APPELLEE

No. 13153

THE WEBSTER MOTOR CAR COMPANY, APPELLANT

v.

PACKARD MOTOR CAR COMPANY, *et al.*, APPELLEES

Appeals from the United States District Court for the District of Columbia

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Decided April 18, 1957

Mr. Harold L. Smith, with whom *Messrs. Robert W. Barker, Louis M. Denit, Jerome G. Shapiro* and *Richard P. McGrath* were on the brief, for appellants in No. 13152 and appellees in No. 13153.

Messrs. William J. Hughes, Jr., and *Donald D. Webster*, with whom *Mr. William E. Leahy* was on the briefs, for appellee in No. 13152 and appellant in No. 13153.

Before EDGERTON, *Chief Judge*, and PRETTYMAN and BAZELON, *Circuit Judges*.

EDGERTON, *Chief Judge*: Packard Motor Car Company and two of its officers appeal from a judgment for $570,000 in favor of Webster Motor Car Company, a former Packard dealer in Baltimore, for alleged violation of the Sherman Antitrust Act. 15 U.S.C. §§ 1, 2, 15. The essential facts are not disputed.

There were formerly four dealers in Packard cars in Baltimore. In 1953 there were three, of which Webster was one. The usual dealer contract in the automobile business, and the contract between Packard and Webster, were for one year, with no option of extension. It was the custom in the business to extend contracts, from year to year, "barring some reason for cancellation." Webster and Packard had extended their contracts from year to year a considerable number of times.

In 1953 Zell Motor Car Company, the largest of the three Baltimore dealers in Packard cars, told Packard that Zell was losing money and would quit unless Packard gave it an exclusive contract. Packard told Zell it would do so, and told Webster and the other Baltimore dealer that their contracts would not be renewed. After Webster protested and threatened suit, Packard offered Webster the usual one-year renewal but refused to promise more. Packard told Zell, in effect, that this would be Webster's last renewal. Webster declined Packard's offer, quit the business, and brought this suit.

The District Court submitted to the jury the question whether there was an unreasonable restraint of trade, and also whether there was an agreement or attempt to monopolize. The jury found for the plaintiff and awarded $190,000 damages, which the court trebled in accordance with the statute. Motions for judgment notwithstanding the verdict, and for a new trial, were denied. The court held that the jury had "a right to reach the conclusion that an agreement on the part of the manufacturer with

one of its own dealers to terminate the franchise of all competitors and to grant to him a monopoly within a certain area, is an agreement in unreasonable restraint of trade, or an agreement to monopolize." *Webster Motor Car Co.* v. *Packard Motor Car Co.*, 135 F. Supp. 4, 9.

We think the defendants were entitled to judgment. We agree substantially with *Schwing Motor Co.* v. *Hudson Sales Co.*, 138 F. Supp. 899 (D.Md. 1956), *aff'd*, 239 F. 2d 176 (C.A. 4, 1956).

1. There was no monopoly, or attempt or conspiracy to monopolize, within the meaning of the Sherman Act. The cellophane case, which had not been decided when the present case was tried, makes this clear. The Supreme Court there said: "this power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product." And the Court held that "In considering what is the relevant market for determining the control of price and competition . . . commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal." The Court accordingly held that, although du Pont produced about 75% of the cellophane sold in this country, there was no monopoly, because "the relevant market" was flexible packaging materials, including such things as glassine, waxed paper, and foil, as well as cellophane, and cellophane accounted for only 17.9% of this market. *United States* v. *du Pont & Co.*, 351 U.S. 377, 393, 395, 399-400. Since there are other cars "reasonably interchangeable by consumers for the same purposes" as Packard cars and therefore in competition with Packards, an exclusive contract for marketing Packards does not create a monopoly. And there is no evidence of any attempt or conspiracy to create a monopoly, since there is no evidence of any attempt to get control of the relevant market.

2. There was no contract or conspiracy in restraint of trade within the meaning of the Sherman Act. As the court informed the jury, it has long been clear that only unreasonable restraints of trade are unlawful. *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1. When an exclusive dealership "is not part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels, the arrangement has invariably been upheld as a reasonable restraint of trade. In short, the rule was virtually one of *per se* legality" until the District Court decided the present case.[1] Of Packard's 1600 dealers, 1100 were the only Packard dealers in their cities, some of which were nearly as large as Baltimore, and such a ratio was typical in the automobile industry. The fact that any other dealers in the same product of the same manufacturer are eliminated does not make an exclusive dealership illegal; it is the essential nature of the arrangement. The fact that Zell asked for the arrangement does not make it illegal. Since the immediate object of an exclusive dealership is to protect the dealer from competition in the manufacturer's product, it is likely to be the dealer who asks for it.[2]

The short of it is that a relatively small manufacturer, competing with large manufacturers, thought it advan-

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[1] Handler, "Annual Antitrust Review", 11 *Record of the Ass'n of the Bar of the City of New York* 367, 370 (1956). *Fargo Glass & Paint Co.* v. *Globe American Corp.*, 201 F. 2d 534 (C.A. 7), *cert. denied*, 345 U.S. 942 (1953); *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (C.A. 2), *cert. denied*, 345 U.S. 994 (1953); *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387, 398-399 (S.D.N.Y.), *aff'd* by an equally divided court, 321 U.S. 707, 719 (1944). *Cf. Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U.S. 565; *G. & P. Amusement Co.* v. *Regent Theater Co.*, 107 F. Supp. 453, *aff'd*, 216 F. 2d 749 (C.A. 6); *Boro Hall Corp.* v. *General Motors Corp.*, 124 F. 2d 822 (C.A. 2); *Hudson Sales Corp.* v. *Waldrip*, 211 F. 2d 268 (C.A. 5); *Hexren Candy Co.* v. *The Curtiss Candy Co., et al*, CCH Trade Reg. Rep. ¶ 68,652 (N.D. Ga. March 8, 1957).

[2] Handler, *supra* note 2, at p. 372.

tageous to retain its largest dealer in Baltimore, and could not do so without agreeing to drop its other Baltimore dealers. To penalize the small manufacturer for competing in this way not only fails to promote the policy of the antitrust laws but defeats it.

3. Though Packard had formerly expressed an intention not to renew its contract with Webster, Packard offered and Webster refused the usual renewal. That Packard had agreed with Zell not to renew Webster's contract again when the proferred renewal expired is immaterial, not only because the agreement was legal, but also because it inflicted no damage.

The judgment in favor of Webster is reversed. Webster's cross-appeal concerning the amount of Webster's attorneys' fee is dismissed as moot.

No. 13152 *reversed;*
No. 13153 *dismissed.*

BAZELON, *Circuit Judge*, dissenting: Webster and Zell were competing Packard automobile dealers in Baltimore. In 1952 Packard served notice of termination of Webster's dealership, but then, after Webster's protest, offered to renew the dealership for only one year without further renewal.

I think the court properly instructed the jury upon the law applicable to conspiracies or combinations in restraint of trade in violation of § 1 of the Sherman Act and that the evidence supports the jury's finding in respect thereto. It is therefore unnecessary to decide whether the determination blow of a conspiracy to monopolize in violation of § 2 may also be sustained.

There was evidence that Zell had asked Packard to eliminate Webster as a competing Packard dealer; that Packard had never before considered that one dealer could be adequate representation in Baltimore; that

Packard had found Webster to be a satisfactory dealer with a good organization; that there was an "understanding" between Zell and Packard, and that Packard had "agreed" with Zell that Webster's franchise be ended; and that, when Webster balked at his demise and threatened to bring an action for damages, Packard had offered Webster a renewal of its franchise in the usual form for one year, which Packard had agreed with Zell would be a final renewal. As a Packard memorandum put it: "This . . . was reviewed in detail and agreed to by Mr. Zell."

From this evidence the jury could have found—as it apparently did—that Webster's elimination as a dealer resulted not from a unilateral decision by Packard in selecting its customers, but rather from an agreement between Packard and Zell to eliminate Zell's competitor and make Zell the sole distributor of Packard cars in Baltimore; in simple terms, that it was an agreement which amounted to a combination or conspiracy to get rid of Webster.[1]

The "common right" of an individual to engage in a lawful calling was protected against restraints at common law,[2] is encompassed within the protection of the Fourteenth Amendment[3] and forms the very basis of the Sherman Act.[4] The purpose of the Act is to protect the individual business man as well as to assure to the con-

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[1] We are not called upon to decide whether § 1 of the Sherman Act applies to a manufacturer who, after a discussion with one dealer, decides to make the latter his exclusive distributor, cutting off all others, for the purpose of improving the manufacturer's competitive position vis-a-vis more powerful manufacturers. Cf. *Schwing Motor Co.* v. *Hudson Sales Co.*, 138 F.Supp. 899, 906 (D.Md. 1956), *affirmed*, —— F.2d —— (4th Cir. 1956). That is not this case.

[2] *Darcy* v. *Allen*, 11 Coke 84b, 77 ENG.REP. 1260 (1576).

[3] *Butcher's Union* v. *Crescent City Co.*, 111 U.S. 746 (1884), concurring opinions of Mr. Justice Field and Mr. Justice Bradley

[4] *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 497-98 (1940).

sumer the benefits flowing from free competition. Applied to a dealership situation, the Act does not interfere with the manufacturer's right to select his dealers but it does prevent him from combining and conspiring with one not to deal with another.[5]

Schwing Motor Co. v. *Hudson Sales Co.*, 138 F. Supp. 899 (D.Md. 1956), *affirmed*, —— F.2d —— (4th Cir. 1956), disagrees with the decision here under review. The latter case would limit the manufacturer's right to select his own customers by the requirement that he make no agreement with one to exclude another. *Schwing* would recognize this limitation only "if the agreement is a horizontal one between competitors, or if the manufacturer dominates the market in the commodity." 138 F.Supp. at 906. In this I think *Schwing* is wrong. The Supreme Court has held that, even apart from monopolistic effect, a *vertical* agreement which excludes a competitor of one of the parties from a substantial market violates § 1 of the Sherman Act.[6]

To avoid the application of the Sherman Act Packard contends that, because Webster rejected the proffered one-year renewal, the jury could not find that Packard refused to deal with Webster. But this contention is not persuasive. The record contains ample evidence from which the jury could have found that the renewal offer was not made in good faith, was prompted by Webster's threat to sue, and resulted from an agreement between Packard and Zell that it would be the last renewal.

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[5] Even individually conceived refusals to deal may be an element in a violation of § 1 of the Sherman Act. *United States* v. *Bausch & Lomb*, 321 U.S. 707, 723 (1944); *Federal Trade Comm'n* v. *Beech-Nut Co.*, 257 U.S. 441 (1922); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955), at 134; cf. *Dr. Miles Medical Co.* v. *Parks*, 220 U.S. 373 (1911).

[6] See *Standard Oil of Calif.* v. *United States*, 337 U.S. 293, 305 (1949), explaining *International Salt Co.* v. *United States*, 332 U.S. 392 (1947).

APPENDIX B

Judgment of the Court of Appeals

Filed Apr 18 1957 Joseph W. Stewart, Clerk

* * * *

JUDGMENT

These appeals came on to be heard on the record from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in case No. 13,152, be, and it is hereby, reversed, and that this case be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

It is FURTHER ORDERED by the Court that the cross-appeal from the order of the said District Court allowing attorney's fees to plaintiff in case No. 13,153 be, and it is hereby, dismissed as moot.

It is further ORDERED by the Court that defendants (Packard Motor Car Company, et al.) recover from plaintiff (Webster Motor Car Company) their costs on these appeals and have execution therefor.

Dated: April 18, 1957.

Per Chief Judge Edgerton.

Separate dissenting opinion by Circuit Judge Bazelon.

APPENDIX C

Order Denying Petition For Rehearing *In Banc*

Filed May 16 1957 Joseph W. Stewart, Clerk

No. 13,152

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ORDER

Upon consideration of appellee's petition for a rehearing in banc, and of appellants' answer thereto, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: May 16 1957

Circuit Judge Danaher would grant the petition for rehearing in banc. Circuit Judges Washington and Burger did not participate in the foregoing order.

Filed May 16 1957 Joseph W. Stewart, Clerk

No. 13,153

• • • • • •

ORDER

Upon consideration of appellant's petition for a rehearing in banc, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby denied.

Per Curiam.

Dated: May 16 1957

Circuit Judge Danaher would grant the petition for rehearing in banc. Circuit Judges Washington and Burger did not participate in the foregoing order.

APPENDIX D

Statutes Involved

* * * *

As both Sections 1 and 2 of the Sherman Act are involved set out below are the relevant parts of these Sections as well as Section 4 of the Clayton Act. These are Sections 1, 2 and 15 respectively of 15 U.S.C.

Sec. 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: * * *"

Sec. 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person of persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations shall be deemed guilty of a misdemeanor * * *"

Sec. 15. "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides, or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

* * * *

APPENDIX E

Supplementary Statement of Facts

The evidence warranted the jury in finding the following facts:

A. Prior to World War II, Packard cars were marketed in the Baltimore area through Zell as sole distributor (R. 38, 429-430). He appointed sub-dealers. Webster was one from 1937 to 1942 (R. 165-6). Because of Zell's power to cancel the sub-dealerships at will, he controlled their operations. They had to obtain cars and parts from Zell at his prices, to limit trade-in allowances to amounts approved by him and could not sell to persons whom he wanted for himself. They could not charge less than Zell for service, nor advertise without his approval (R. 1033-4, 1033-7 at 1035, 616-18; also R. 165-7, 173-4). The Zell organization had not changed materially between 1938 and 1952, and Packard knew this (R. 190).

B. Immediately after the war, Packard terminated Zell's distributorship and franchised multiple competing dealers in Baltimore. The dealers bought cars and parts directly from Packard at uniform prices, and competed freely with one another as to sale prices, trade-in allowances and cost of service (R. 165-7). Zell, Webster and two other dealers held such direct franchises in 1951 (R. 42-3, 45, 62, 76).

C. The new system was of great value to the Baltimore public as compared with the earlier arrangement under which prices of everything connected with Packard cars and service were fixed by Zell (R. 42-4, 171-3, 228-9, 329, 350-1, 440-1, 459-61, 519-20, 523-5, 527, 624, 1026-9, 1055).

D. In late 1951, Zell persuaded Packard to reduce the number of dealers from four to three by asserting that the competition of other Packard dealers was causing him

to operate "in the red", and that he was unwilling to continue in such a situation (R. 994, 1081-4, 993. Also R. 54, 64). On January 29, 1952, Zell renewed this assertion and threatened to give up his franchise unless Packard eliminated Webster and the other competing dealer DeBaugh [R. 996, 255-61, 315-16. See Int. 27(a) and (c), R. 54, 64-5].

E. Zell's statement that he was losing money was not true. His operations were profitable; but in the closing months of each year a book loss was produced by large increases in the already ample salaries of Zell's officers and owners, doubtless for tax purposes. If Zell's total salaries, commissions and wages had borne the same percentage relationship to Zell's total sales in 1949, 1950 and 1951 as Webster's bore to its total sales during the same period, Zell would have made a corporate net profit of $30,881.55 in 1949; $16,452.44 in 1950 and $18,390.52 in 1951. Packard knew all this from the monthly operating reports required of all dealers.[1] It repeatedly recom-

[1] Zell's monthly financial statements to Packard, 1949-53, are in evidence as defendant's Exs. (D) 68-72, but were not printed in the Joint Appendix. The originals have been transmitted to this Court. D. 68 shows that through November 25, 1949, Zell had a net profit of $4,528.32; but that in December, Mr. Zell increased his own monthly salary from $1,250 to $7,500 and that of the officers from $3,255.83 to $7,033.37. These increases, totaling over $9,000, and other extravagances, enabled Zell to show a corporate loss of $15,366.80 for 1949 (see Zell's financial statement for February 1949 and Packard's comments thereon, and the changes Zell made in its March 1949 statement to understand better that Mr. Zell's salary was reflected under "Salaries— Officers or Owners," while those of the other Zell officers appeared under "Salaries—Other Supervision").

Similar salary binges distributed Zell's profits in 1950 and 1951 (D. 69, 70). This is made plain by D. 69, Zell's financial reports for 1950 which shows that as of October 25, 1950, Zell had a corporate net *profit* year-to-date of $257.94. However, within 30 days Zell was able to report a corporate net *loss* year-to-date of $18,708.67. Mr. Zell merely paid himself a monthly salary of $13,550 for November and boosted his other officers' salaries from

mended and Zell ignored changes in operating and control techniques which Packard said would have increased Zell's profits from forty to sixty thousand dollars a year (see Defendant's Ex. 68, Dealer Financial Statement Analysis for January 1949; then R. 1058).

F. On February 11, 1952, Packard secretly agreed to do as Zell requested by refusing to renew Webster's and DeBaugh's franchises when they expired on March 31, 1952 (R. 264, 997, 535-7, 560-1, 999-1000, 1003, 1009-10, 283-5). They were not renewed and they were told their termination was final (R. 42-3; Int. 39 and 43, R. 55 and 66; R. 189-192, 266, 278-9, 1004, 1045-6, 274, 1035). Packard gave them no reason for doing so.

G. All Packard dealer franchises (as is true of many makes of automobiles and other products) are written

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$1,516.69 in October to $8,358.37 for November. Zell's year-end corporate net "loss" was reported as $20,583.45.

To compute the profit Zell would have made if its total salaries, commissions and wages had borne the same percentage relationship to its total sales as Webster's did to its total sales requires comparison of the yearly December financial statements of the two firms appearing in D. 64-71. D. 68 reveals that Zell's *total* sales (including new and used cars, service, parts and accessories) for 1949 were $1,450,652.80, while its *total* salaries, commissions and wages (made up of four different accounts "Salaries and Commissions", "Salaries—Officers or Owners", "Salaries—Other Supervision" and "Other Salaries, Commissions and Wages") were $165,201.88, or 11.4% of total sales. But D. 65 shows that in 1949, to make $685,358.49 worth of sales, Webster's salaries, commissions and wages totaled only $55,044.75, or 8.2%. If Zell's total salaries, commissions and wages in 1949 had been 8.2% of its total sales, they would have totaled only $118,953.53, or a saving to Zell of $46,248.35 for the year. Instead of a year-end loss of $15,366.80, Zell would have shown a corporate net profit of $30,881.55.

Similar comparisons of Zell's and Webster's December statements for 1950 (D. 69 and 64, respectively) and 1951 (D. 70 and 66, respectively) establish that Zell would have profited $16,452.44 in 1950 and $18,390.52 in 1951 if it had maintained the same ratio between salaries, commissions and wages and total sales as Webster's.

for one year periods expiring automatically each March 31st (Ans. pars. 48-9, R. 42-3). Packard customarily renewed them from year to year in the absence of grounds for cancellation for cause because of misconduct of the dealer (R. 311, 445-6, 456-8, 466).

H. Packard had no basis for cancelling Webster's or DeBaugh's franchises for cause [Int. 28(b), R. 54-5 and 65; R. 519]. They were both satisfactory and each was making money. Webster's gross business in 1951 was $641,769.41 (Defendant's Ex. 66, Webster's December 1951 statement). Packard had not contemplated their non-renewal nor abolition of a competing dealership system until Zell's demand (R. 265, 442, 434, 462).

I. There were special reasons for continuing Webster as a dealer. For many years he had sold more Packard cars than any other salesman in the world. When his showroom was destroyed by fire in 1949, and he hesitated to make the $100,000 investment necessary to replace it, Packard urged him to do so and assured him that his franchise would be continued for many years (R. 432-9, 456-8, 463-5, 184-5, 199, 208, 218-9, 912, 915).

J. There was no shortage of Packards (R. 444). Enough were available to enable each of the three dealers to make money. Almost undoubtedly new dealer capital would have been available if Zell had quit. The $1,350,000 of Packard business which went to Zell in 1953 (Int. 109, R. 61, 72-5) maintained four Washington, D. C. dealers still listed in Packard's ad in the Classified Telephone Directory of February 1956 (Covington, McNey, Central and O'Brien-Rohall).

K. Packard concealed from Webster its agreement with Zell (R. 279). It did not test the reality of Zell's threat to resign, nor try to persuade him to continue. The only thing it did was try to get DeBaugh and Webster, once their franchises with Packard were terminated, to stay

on again as Zell-controlled, non-competitive sub-dealers (R. 180, 182, 973, 1004-5, 1042, 998; 324-31, 333-7).

It did not seek a substitute to fill Zell's place if he carried out his threat. Nor did it inquire whether Webster could enlarge his operations to take up the slack which would be caused if Zell quit (R. 313-4, 591). Webster, on March 9, 1952, in pleading for franchise renewal, had offered to invest more capital (R. 973).

L. On Webster's objection to the unexplained non-renewal of his franchise, Zell and Packard secretly agreed to try to get Webster to agree to a new franchise limited to July 1 (R. 999; Int. 69, R. 58, 68; R. 1045-6, 274). On Webster's refusal and continuing objection to its cancellation (R. 1035, 189-92), Packard and Zell agreed that Packard should offer Webster a contract to run until March 31, 1953, subject, however, to a secret agreement between Packard and Zell that Webster's franchise would not be renewed thereafter (R. 292-3, 552, 1044, 286-9, 1003-5). Webster stated its willingness to accept the extension if Packard would state that it was offered in good faith rather than as a "postponement of a death sentence" (R. 977-9). Packard refused to give such assurances (R. 979, 976-7), ordered all programs for Webster "cancelled immediately" (R. 1152-5, 1030), and decreed that "The Zell Motor Car Company will now handle the Baltimore Metropolitan Area exclusively" (R. 1007-8, and 1005-6).

M. Therefore, by mid-1952, Baltimore, sixth among the ten most populous cities in the United States according to the 1950 Census, had only one Packard dealer: Zell.

In each of the other nine cities there were then an average of twelve competing Packard dealers.[2]

N. After becoming sole dealer, Zell advertised for salesmen "tired of multiple-dealer competition" (R. 1055). Purchasers of Packard cars in Baltimore, no longer having competing Packard dealers there so that they could check one dealer's prices against another's and get the benefits of multiple-dealer competition, were deceived by Zell into believing they were getting from him high trade-in allowances on their used cars, when in reality all he did was boost Packard's "suggested retail price" on the new car by the amount he increased the allowance on the used car (R. 1060-6 at 1062-3).

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[2] The Circuit Court majority stated (App. A, *infra*, p. 26):

"Of Packard's 1600 dealers, 1100 were the only Packard dealers in their cities, *some of which were nearly as large as Baltimore*, and such a ratio was typical in the automobile industry." (Emphasis supplied.)

Diligent search has turned up no Record support for the emphasized portion of the asserted fact. See R. 474.

Going outside the Record to the Library of Congress, the following is a tabulation of "Authorized Packard Dealers" whose names are listed in the official Packard Motor Car Company ads in the yellow pages of the 1952 telephone directories of the ten most populous cities according to the 1950 Census:

1. New York (Queens, Bronx, Manhattan & Brooklyn)	19	6. Baltimore	4
2. Chicago	17	7. Cleveland	8
3. Philadelphia	12	8. St. Louis	2
4. Los Angeles	14	9. Washington, D. C.	9
5. Detroit	15	10. Boston	13

This was brought to the Circuit Court's attention by Webster's petition for Rehearing *in banc*.

Office Supreme Court, U.S.
FILED
SEP 9 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. [redacted] 213

THE WEBSTER MOTOR CAR COMPANY,
Petitioner

v.

PACKARD MOTOR CAR COMPANY, et al
Respondents

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM J. HUGHES, JR.
Bowen Building
Washington, D. C.

DONALD D. WEBSTER
3502 Turner Lane
Chevy Chase, Md.
Attorneys for Petitioner

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

PAGE

Preliminary Statement 1

1. Packard's Contention That The Essential Facts Were Undisputed And Hence No Jury Question Was Involved 2

2. Packard's Contention That The Court Below Based Its Reversal On A Careful Review Of The Evidence 4

3. Packard's Contention That Webster Caused Its Own Loss By Rejecting The Renewal Offer 6

4. Packard's Contention That There Was No Unreasonable Restraint Of Trade 9

5. Packard's Contention That The *Waldrip* and *Fedderson* Cases Support The Majority Below 13

Conclusion 15

Appendix A: Facts Concerning The Renewal Offer 17

CITATIONS

Cases:

Fashion Originator's Guild v. *F.T.C.*, 312 U.S. 457 9-10

Fedderson Motors, Inc. v. *Ward*, 180 F.2d 519 (C.A. 10) 14-15

Hudson Sales Corp. v. *Waldrip*, 211 F.2d 268 (C.A. 5), *cert. denied*, 348 U.S. 821 13-15

Lawlor v. *National Screen Service Corp.*, 349 U.S. 322 16

Nelson Radio & Supply Co. v. *Motorola*, 200 F.2d 99 (C.A. 5) 13

Paramount Film Distributing Corp. v. *Village Theatre, Inc.*, 228 F. 2d 721 (C.A. 10) 14

Schwing Motor Co. v. *Hudson Sales Co.*, 138 F. Supp. 899 (D.C.Md.), *aff'd. per curiam*, 239 F. 2d 176 (C.A. 4) 4, 8

PAGE

U.S. v. *du Pont & Co.*, 351 U.S. 377 ..... 1, 4, 5, 15
U.S. v. *Guerlain, Inc.*, 26 U.S. L.Wk. 2041 (D.C. S.D.N.Y.), decided July 9, 1957 ..... 5, 8

Miscellaneous:

American Bar Association Journal, July 1957, Vol. 43, p. 645 5
Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), p. 136 14

IN THE

Supreme Court of the United States

October Term, 1956

No. 1113

THE WEBSTER MOTOR CAR COMPANY,
Petitioner

v.

PACKARD MOTOR CAR COMPANY, et al
Respondents

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Preliminary Statement

The jury verdict for Webster was set aside by the Court of Appeals.

That court interpreted the *Cellophane* decision of this Court as requiring this drastic step.

In reversing the jury verdict, the majority below laid down a rule-of-law, declaring agreements or conspiracies *per se* legal if, in the opinion of appellate judges, the product involved is as "reasonably interchangeable" with others as they consider cellophane to be with glassine, waxed paper and foil.

On this theory the majority below felt there was no need to examine the evidence to see whether there was enough to go to the jury, and did not do so. Only Judge Bazelon, dissenting, did so, and he found there was ample evidence to support the jury verdict.

The majority below, having *first* concluded as a matter of law that Packard and Zell had a right to carry out an agreement to terminate Webster's franchise on March 31, 1952, could see nothing wrong in Packard's and Zell's agreeing, after notice of this suit, to offer to renew Webster's franchise to run until March 31, 1953, with the secret understanding between them that it would be Webster's last renewal. To the majority, Packard and Zell would merely be postponing until March 31, 1953, what they had a perfect right to do a year before.

The foregoing analysis reveals the erroneous nature of the action of the majority below. We now point out the fallacies of the arguments advanced by Packard to justify the action below.

1. *Packard's Contention That The Essential Facts Were Undisputed And Hence No Jury Question Was Involved*

To justify the appellate court's ignoring the jury verdict, Packard claims that the "essential facts" were "undisputed" and that the "undisputed" facts did not warrant submission to the jury. (Br.Op. 5-7, 10-11, 14-22.)[1]

But the trial judge submitted the case to the jury after setting forth the conflicting contentions of the parties as to the facts (R. 936-949). In denying Packard's motion for judgment n.o.v., his opinion (R. 136 and 135 F.Supp. 4) makes it clear that he considered that the principal facts were in dispute. To anyone who reads *either* his charge *or* his opinion, it is obvious that he left to the jury the resolution of the conflicts of testimony and claims on all vital issues.[2]

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[1] "Br.Op." refers to Packard's brief in opposition; "Ptn." refers to the petition for certiorari; "R." refers to the joint appendix.

[2] The instructions left the following issues among others to the jury: (a) whether Zell devised and effected an agreement with Packard to eliminate Zell's Packard-dealer competitors, or whether their elimination was done in the exercise by Packard of permissable business judgment and not pursuant to any conspiracy or agreement (R. 940, 943-944); (b) whether the public was in-

This action by the trial judge is not inconsistent with his remarks quoted by Packard in its brief in opposition (BrOp. 5-7). He was referring to the difference between Packard's denials and the evidence. For example, Packard denied throughout the trial that it had conspired or agreed with Zell to terminate Webster's franchise;[3] yet Packard's own witnesses and documents left little or no basis for denial of the agreement.[4] The quoted comments

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jured by elimination of competition in the sale and servicing of Packard cars in metropolitan Baltimore, or whether the competition more important to the public was that between Packard and other makes of cars there (R. 945); (c) whether the agreement (if one was found to exist) was unreasonable in view of all the facts of the case (R. 943-944); (d) whether Packard's renewal offer was made in good faith or in bad faith as part of an agreement with Zell to eliminate Webster (R. 941) and (e) whether Webster was damaged by what Zell and Packard did, or by his own act (R. 945).

[3] Packard *began* with this denial (Pars. 21, 51 and 64 of the Complaint and Answer at R. 6-7, 15, 21, 36, 43, 46). It *ended* on the same note. Its counsel, in concluding his closing argument, said (R. 922):

> "It was an independent decision reached upon consideration of the factors which I have discussed with you today, and about which you have heard evidence over these many, many days. *It was no conspiracy, contract, or combination between Packard and Zell.*" (emphasis supplied)

[4] Packard's General Sales Manager, Briggs, under cross examination as to what Zell "agreed" to do if made the sole dealer, replied (R. 536-7):

> "I recall the highlights of it. First, he was to renew the leases on his facilities to maintain service. He was to increase his organization, salesman power-wise, the number of salesmen at the moment I can't recall. He was to guarantee to us or try to give us a larger percentage of the Packard business in Baltimore as a sole dealer than we had been able to get with two dealers. *Those are the highlights of the agreement.*" (emphasis supplied)

During the deposition of the defendant Beck (R. 283-5), Packard's Washington, D. C. Zone Manager, he, too, admitted the agreement; but Packard's counsel immediately requested a recess and, upon resuming, Beck said he would like to change his testimony to eliminate his admission that "we had agreed." When asked

are thus seen to be nothing more than the trial judge's mild censure of Packard for having defied undeniable facts.

And in any event the trial judge's remarks, made during a needlessly long trial, cannot alter the fact that when the closing arguments were over, the jury was told, in effect, that issues existed as to every essential fact. The jury was informed of the conflicting evidence and contentions of the parties; and was instructed, "The facts are for you to determine." (R. 936-949 at 945.)

2. *Packard's Contention That The Court Below Based Its Reversal On A Careful Review Of The Evidence*

Trying to denude this case of its antitrust importance, Packard contends that the Court below, after a careful review of the evidence, simply held that there was not enough to go to the jury.

To anyone who reads the opinion of the majority below, this contention must appear absurd. They obviously rested their decision on the belief that in accordance with the *Cellophane* decision, the *Schwing* case and Professor Handler's newly-proclaimed theory that such exclusive territorial dealerships are virtually *per se* lawful, the Packard-Zell agreement was, *as a matter of law*, lawful. To them, it was thus unnecessary to review the evidence and they made no pretense of doing so.

Instead of defending what the majority below *actually* did, Packard tries now to prove they did what Judge Bazelon in his dissent said, and we say, they *should have* done. Nothing could illustrate more forcefully that

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why, he admitted that during the recess he had "discussed it with the attorneys."

Written admissions of the agreement, made by Packard's co-conspirator Zell in letters to Packard officials, were put in evidence as Pltf's. Exs. 33 and 37 (R. 997, 999-1000).

Packard now recognizes the seriousness of the error of the majority below in doing what they did.

It is for its antitrust significance that the *Webster* case is already being cited and discussed. See *United States* v. *Guerlain, Inc.*, 26 U.S. L.Wk. 2041 (D.C.S.D.N.Y.), decided July 9, 1957, opinion by Edelstein, J. (discussed *infra*, p. 8); and the *American Bar Association Journal*, July 1957, Vol. 43, p. 645.[5]

It is clear from the majority opinion below that they felt that as a matter of law Packard had a right to carry out an agreement with Zell to terminate the franchises of his Packard-dealer competitors. However, it is not so clear *why* they concluded that "there are other cars 'reasonably interchangeable by consumers' for the same purposes' as Packard cars and therefore in competition with Packards" (Ptn. 25). Unlike duPont's elaborate proof of cross-elasticity between cellophane and other flexible packaging materials, Packard offered no proof as to when or why an owner of a Packard will switch to another make of car, or vice versa; or what cross-elasticity there was for Packard owners wishing Packard-authorized service in Baltimore after Zell became sole dealer there. To the contrary, the jury apparently found on ample evidence that the competition between the Baltimore Packard dealers was more important to the public than the competition between Packard and other makes of cars there (see Ptn. 8-9 and 33; R. 944-5).

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[5] In this issue of the *Journal*, under the heading "What's New in the Law," the first paragraph of comments concerning the *Webster* case reads as follows:

> "The Cellophane case's 'relevant market' doctrine, formulated by the Supreme Court in *U.S. v. du Pont*, 351 U.S. 377, has been applied by the Court of Appeals for the District of Columbia Circuit to deny treble-damages recovery to a Baltimore Packard dealer whose suit was predicated on a charge that Packard refused to renew its franchise because of an agreement to make another the exclusive dealer in Baltimore."

The majority below reached the conclusion that other cars are "reasonably interchangeable" with Packards either (a) by taking "judicial notice" thereof, or (b) by reasoning that if cellophane is "reasonably interchangeable" with foil, waxed paper and glassine, Packard *must be* "reasonably interchangeable" with other makes of cars. Whichever of these two routes they followed, they erred in doing so. Unless this Court rejects such appellate fact finding, unsupported by and contrary to the record and jury verdict in the case under review, other lower Federal courts will follow suit.

3. *Packard's Contention That Webster Caused Its Own Loss By Rejecting The Renewal Offer*

Packard asserts that Webster has only itself to blame for the loss of its business because it "rejected the usual one-year renewal of its dealership agreement." (Br.Op. 1, 5, 7-8.)

Again, the jury verdict, supported by ample evidence, is to the contrary (R. 945 and 940-3). As Judge Bazelon said in his dissent (Ptn. 29), there was sufficient evidence to support a jury finding that "the renewal offer was not made in good faith, was prompted by Webster's threat to sue, and resulted from an agreement between Packard and Zell that it would be the last renewal."

The portions of the majority opinion which Packard relies on to prove that Webster caused its own loss (Br. Op. 7-8) make clear two facts:

> *First*, That, as the majority below said, Packard did not offer to renew Webster's franchise until "After Webster protested and threatened suit . . ."; and *Second*, That, as the majority below said, "Packard had agreed with Zell not to renew Webster's contract again when the proffered renewal expired . . ."

Nevertheless, they went on to conclude that this "is immaterial not only because the agreement was legal but also because it inflicted no damage."

Of course, *if*, as the majority had previously concluded, Packard had a right, a a matter of law, to carry out an agreement with Zell to terminate Webster's franchise on March 31, 1952, the fact that they agreed to offer to renew his franchise and let it run until March 31, 1953, would be "immaterial" because this agreement, too, would then be "legal" and would have "inflicted no damage." *But*—and this is the point—*if* Packard had no such right as a matter of law, *and if* it was within the proper province of the jury to determine that in carrying out an agreement with Zell to terminate Webster's franchise on March 31, 1952, Packard unreasonably restrained trade in violation of Sec. 1, then the fact (recognized by the majority below) that Packard's renewal offer was not made until after notice of suit, and then only after agreeing with Zell that it would be Webster's last, is most material, supporting a jury finding of Packard's gross bad faith, and Webster's damages.

Thus, what the majority below *said* about the renewal offer appears to have been merely a logical extension of what they had previously *held* as to the legality of the Packard-Zell agreement to eliminate Webster. If, as we contend, their holding was wrong, their extension topples, too.

Certainly it cannot be argued that in offering to renew Webster's franchise after notice of suit and after having secretly agreed with Zell that it would be Webster's last, Packard was offering Webster the equivalent of what it had had in previous years. At the very least Packard and Zell deprived Webster of the right to have a future possible renewal given a fair consideration, as distinguished from being foreclosed in advance by a cut-and-dried agreement. Always before, in addition to a one-year renewal, Webster had had a reasonable expectancy of further renewals. It was on this expectancy that just two years before, Webster, on Packard's advice and urging, had invested almost $100,000 in buying, rebuilding

and re-equipping his burned-out facilities (Ptn. 36). Bad faith as to the proffered renewal probably served to bolster the jury's impression of Packard's bad faith generally.

While Webster's renewal expectancy might not have been enforceable by a contract action, it was protected by the antitrust laws from conspiratorial interferences in unreasonable restraint of interstate commerce. Said another way, the fact that Packard might have had a contract right to refuse to renew Webster's franchise would not insulate Packard from the antitrust laws if in carrying out a conspiracy in unreasonable restraint of trade it accomplished its purpose by exercising that right.

In contending that Webster caused its own loss, Packard, in effect, claims that the pronouncements as to antitrust law in the majority opinion below can safely be left unchallenged on the theory that the case will not be cited theryfor and will be distinguished as resting on other grounds. This claim is illusory. See *United States* v. *Guerlain, Inc.*, 26 U.S. L.Wk. 2041 (D.C.S.D.N.Y.), decided July 9, 1957, opinion by Edelstein, J.[6]

Because of the brevity of the majority opinion, there might be some doubt as to the chronology of events con-

[6] The *Guerlain* case involved a Sec. 2 charge of monopoly of one brand of perfume. The defense relied on the *Webster* and *Schwing* cases as holding that the product of a single manufacturer cannot constitute a relevant market. In holding Guerlain liable, Judge Edelstein had great difficulty in reconciling his decision with the *Webster* and *Schwing* decisions. He finally distinguished them on the ground that there is probably greater cross-elasticity between various makes of automobiles than between different brands of perfumes.
Thus, in order to avoid the anti-antitrust effect of the majority opinion below, District Court judges are already having to draw very dubious and tenuous distinctions. Compare the alternatives available to a Packard owner who needs a new Ultramatic transmission for his Packard with those afforded one who goes into a drug store to buy, off-the-shelf, an ounce bottle of perfume.

cerning Packard's renewal offer. In Appendix A to this brief, those facts, as established almost entirely by Packard employees and documents binding on Packard, are set forth.

4. *Packard's Contention That There Was No Unreasonable Restraint of Trade*

Packard makes the following three arguments to prove that it did not unreasonably restrain interstate commerce by carrying out its agreement with Zell to eliminate his competitors:

> a. It agreed with Zell to make him sole dealer in order to improve Packard's competitive position vis-a-vis manufacturers of other cars.
>
> b. It is a relatively small automobile manufacturer and therefore, inferentially, it should have greater antitrust rights than General Motors.
>
> c. Webster was not a satisfactory dealer but Zell was.

The short answer to all these arguments is that the jury has already rejected them by finding the restraint unreasonable. The dissent below rests primarily on the fact that "the court properly instructed the jury upon the law applicable to conspiracies . . . in restraint of trade in violation of Sec. 1 of the Sherman Act and . . . the evidence supports the jury's finding in respect thereto." (Ptn. 27)

Turning briefly to each of these contentions: First, in answer to Packard's contention that it did what it did in order to improve its competitive position vis-a-vis manufacturers of other cars, Packard's alleged motive in agreeing with Zell to destroy *his* competitors is but one of many factors which the jury must have considered in measuring what was done by the rule of reason. The most benevolent motive would not make reasonable a restraint which, as in the case at bar, the jury on all the facts must have found unreasonable. See *Fashion Orig-*

inator's Guild v. *Federal Trade Commission*, 312 U.S. 457 (1941).

Certainly to the majority below, *why* Packard did what it did was of no decisive significance. They did not analyze the various factors one would consider in determining the reasonableness of the restraint.[7] To them, the decision of this Court in the *Cellophane* case compelled reversal—regardless of *why* Packard did what it did. They felt that other cars are as "reasonably interchangeable" with Packards as glassine, waxed paper and foil are with cellophane. Any doubts the majority might have had as to whether they should wade through the record in order to see whether there was sufficient evidence to support the jury's finding of unreasonableness, were removed when they learned that Professor Handler had recently said in a speech to the Association of the Bar of the City of New York that such an exclusive territorial dealership as Packard gave Zell was virtually *per se* lawful.

Only Judge Bazelon was concerned enough about why Packard did what it did to examine the evidence to see whether it would support a jury finding of unreasonable

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[7] The majority opinion does not comment on the fact that the evidence warranted jury findings that Zell's statement that it was losing money was untrue (Ptn. 34); that Packard knew this (Ptn. 34); and also knew that Zell had unduly inflated the cost of cars and service when he formerly had the field to himself (Ptn. 33). Nor as to whether a manufacturer threatened as Packard was by Zell should test the reality of the threat (Ptn. 36) or discuss the problem with the other affected dealers (Ptn. 37), or seek a substitute for the threatening dealer (Ptn. 37). Or seek alternatives to the destruction of dealers whom it had established in the belief that multiple dealership competition was in its own interest (Ptn. 33, R. 497-499), and who were making money (Ptn. 36), and against whom it had no thought or basis for cancellation for cause (Ptn. 36). Nor was the evidence discussed as to whether competition between the Baltimore Packard dealers benefited the public, as the jury necessarily found under the court's instructions (R. 942-5).

restraint. He concluded it would. He expressly rejected Packard's claim and said that this is *not* a case involving a manufacturer who, after a discussion with one dealer, decides to make the latter his exclusive distributor, cutting off all others, for the purpose of improving the manufacturer's position vis a vis more powerful manufacturers (Ptn. 28).

"Second, in answer to Packard's contention that it is a relatively small automobile manufacturer; we agree that, compared to General Motors, Packard is small. But, compared to Packard, Webster was microscopic. It is absurd for Packard to try to generate sympathy by comparing its size to that of other automobile manufacturers. Indeed, Packard's being small might, in part, be due to just such short-sighted business practices as agreeing with Zell to destroy good Packard customers (Webster and DeBaugh)."

Packard ignores the fact that the antitrust laws do not penalize the large and reward the small as such. They protect competition, and, until the decision below, they punished those who combined unreasonably to destroy it. The fact that Packard is a relatively small giant is immaterial and should evoke no sympathy.

Strangely enough, the majority below seems to have attached some significance to Packard's being a "relatively small manufacturer" (Ptn. 26). The inference that they would permit those relatively small to fight unfairly while requiring those larger, on pain of treble damages, to keep their punches up, establishes a dual standard of antitrust liability; another reason why review by this Court is urgently needed.

Third, in answer to Packard's contention that Webster was not a satisfactory dealer but Zell was; Packard's own officials and documents proved the contrary. Braden, Packard's Washington Zone Manager before Beck (1945-50), testified that Packard had always found Webster a

satisfactory dealer (R. 434) with a capable and aggressive sales force (R. 462). Two Dealer Contract Reports written by Packard's R. G. Funk three days before and three weeks after Webster's franchise terminated on March 31, 1952, show that this Packard official was making similar evaluations of Webster to his superiors (R. 1043, 1048).

The decision to claim that Webster was not a satisfactory dealer was apparently a Packard afterthought for jury effect. In 1951, Packard estimated that Webster was able to sell 200 new cars (R. 966, 968). On April 22, 1952, Packard increased this estimate by almost 50% to 291 cars (R. 985).

Packard's argument that Webster had not been a satisfactory dealer (Br.Op. 4, 18-19) is based on three Packard interoffice memoranda (Defs.' Exs. 15, 16 and 17 at R. 1073, 1075 and 1080). These memoranda were written by Packard employees Platfoot and Marnocha. Packard failed to call either as a witness.*

Packard introduced various charts made up solely for the purpose of the trial designed to prove that Zell gave the public a better deal than Webster (Defs.' Exs. 26 and 81A-81J at R. 1131 and R. 1164-80; R. 677, 825-7). The jury might well have given them little weight for ample reasons brought out during cross examination of the witnesses who prepared them. The jury probably realized that if Zell gave the public a better deal than his Packard-

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* Even these documents contain no greater indictment of Webster than that Platfoot and Marnocha felt Webster should make larger trade-in allowances. Since Webster was destroyed because Zell resented its competition, for Webster to have competed more vigorously would probably have quickened Zell's "ultimatum" (R. 260) and Webster's demise.

Defs.' Ex. 16 (R. 1075-7) is far more critical of Zell than of Webster. Zell's name heads the list of "Problem Dealers" and he is charged with being a "Loss dealer; low new car volume."

dealer competitors, the public would have bought from Zell. They knew that Zell had complained that he had tried but failed to sell 60% of the people who bought Packards from Schulte (R. 1080 at 1082). Zell's bleat, not Packard's charts, tells the true story; i.e., Zell's Packard-dealer competitors were giving the public a better deal and consequently were getting the business.

Packard claims that after Zell became sole dealer, he was benevolent. If, after notice of suit, Zell had been generous to the Baltimore public, that fact could not wipe out Packard's liability. The kind of dealer Zell was after April 1, 1952 is best evidenced by his ads for salesmen "tired of multiple dealer competition" (R. 1055), his deceitful price-padding practices (R. 1060-6 at 1060-3), and a Packard report in 1954 telling Zell that his "market potential is much greater than even your present new car sales indicate" (R. 1058-1060).

5. *Packard's Contention That The Waldrip And Fedderson Cases Support The Majority Below*

In *Hudson Sales Corp.* v. *Waldrip*, 211 F.2d 268 (C.A. 5, 1954), *cert denied* 348 U.S. 821, a decision for the dealer by a District Court sitting without a jury was reversed and judgment entered for the defendants. The alleged conspiracy was between Hudson Motor Co. and Hudson Sales Corp., its wholly-owned subsidiary. The Court of Appeals, at p. 273, expressed doubt that such a "conspiracy" was actionable, citing its prior decision in *Nelson Radio & Supply Co.* v. *Motorola*, 200 F.2d 99.

The remaining distinctions between the *Waldrip* and *Webster* cases are many. In effect, they are summarized in the following statement by that court (211 F.2d 268, 273):

> "Finally, the only findings that this record would reasonably support are: that, acting on business considerations, defendant determined that plaintiff was

too spread out, his efforts too dispersed to give Hudson the effective representation of master dealer in his territory to which Hudson was entitled; that it did this under its policy, which was not in purpose or effect a violation of any law, to select master dealers who would best serve Hudson's interest; and that having first endeavored to induce plaintiff to produce more worthwhile results, and having found that plaintiff was unable or unwilling to give it the satisfactory service it was entitled to, defendant did not terminate his contract but at its termination according to its terms simply declined to renew it."

Fedderson Motors, Inc. v. *Ward*, 180 F.2d 519, was decided in 1950 by the Court of Appeals for the Tenth Circuit. Six years later, the same court[9] decided *Paramount Film Distributing Corp.* v. *Village Theatre, Inc.*, 228 F.2d 721. At p. 726, it cited with approval the District Court's decision in the *Webster* case. Thus it is obvious that the Tenth Circuit (a) approves the District Court's decision here, and (b) not having reversed *Fedderson*, believes it to be unlike *Webster*.

In *Fedderson*, the Court of Appeals affirmed a decision dismissing, for failure to state a cause of action, an antitrust suit against Hudson, Fred Ward, Inc. (a Hudson distributor) and Fred Ward. Fedderson had alleged that the defendants forced him out of business because he refused to do certain things Hudson wanted him to do, things he considered unreasonable (e.g., to stop operating a business side-line at his dealership; to maintain a business establishment equipped to sell and service 125 new Hudsons a year). The Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), p. 136, cites the *Fedderson* and *Waldrip* cases as instances of buyers cut off from supplies "for failure to adhere to

[9] Chief Judge Phillips wrote the opinion in the *Village Theatre* case, and sitting with him were Circuit Judges Huxman and Savage. In the *Fedderson* case, Chief Judge Phillips and Circuit Judges Huxman and Bratton sat; Bratton, J. writing the opinion.

the seller's distribution policy." Packard does not, and could not, claim it cut off Webster for any such reason.[10]

The court also found Fedderson's complaint defective, stating (180 F.2d 519, 522):

> "But these were general allegations in the nature of conclusions, without any averment of specific acts from which it could be determined as a matter of law that defendants violated the act with harmful results to the public."

No one who reads Webster's complaint (R. 1-29) can say that specific acts are not averred.

Neither the *Waldrip* nor *Fedderson* case supports the decision of the majority below, and Packard's reliance on them is unfounded.

CONCLUSION

Packard's brief in opposition does not meet any of the serious antitrust or jury questions raised by the decision of the Court of Appeals. Instead, it obscures the significance of the fact that that court set aside a jury verdict and, in doing so extended the decision of this Court in the *Cellophane* case so as to lay down a grossly anticompetitive rule of *per se* legality.

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[10] On February 20, 1952, Richard Webster requested Beck to notify him of any existing circumstances in the Webster Company which might cause it to fall below the Packard dealer standard "so that I may take swift action to effect your sound suggestions" (R. 969-972 at 970). Beck forwarded this letter to Detroit but, on advice of Packard's counsel, it was never answered (R. 278, 602; Ints. 30 and 31 at R. 55 and 66).
On March 9, 1952, Webster again wrote Beck, expressing the opinion that he was entitled to be told of any weakness in his dealership justifying termination, and stating (R. 973): "If more capital investment were necessary it would be forthcoming; if personnel changes were necessary, they would be made." Again, on advice of counsel (R. 602, 729), no reply was sent to Webster (Int. 50; R. 57, 67).

Packard ignores the fact that the rule of law established by the court below makes antitrust liability dependant solely upon economic market conditions as found by appellant judges—even though contrary to the findings of a jury.

It frequently has been said that treble damage actions are an important aid to the enforcement of the antitrust laws. (*Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 329). To render them effective, and for the reasons set forth in the petition for certiorari and this reply, it is respectfully submitted that the petition herein should be granted.

WILLIAM J. HUGHES, JR.
Bowen Building
Washington, D. C.

DONALD D. WEBSTER
3502 Turner Lane
Chevy Chase, Md.
Attorneys for Petitioner

APPENDIX A

Facts Concerning The Renewal Offer

February 11, 1952: Packard agreed to make Zell the sole Baltimore dealer as of April 1, 1952 (R. 997; Int. 27c, R. 54 and 65; Int. 39, R. 56 and 66).

March 27, 1952: Zell's franchise was renewed (R. 1049).

March 31, 1952: Webster's and DeBaugh's franchises expired and, in accordance with Packard's agreement with Zell, were never renewed thereafter (R. 976; Packard's Ans. Pars. 48 and 53 at R. 42-44).

April 3, 1952: Beck admitted telling Mr. Webster on this date "that it was the full intention of the Packard Motor Car Company that he should liquidate his Packard business in Baltimore" (R. 1045-6; see also R. 189-192).

April 15, 1952: Instead of liquidating, Webster retained counsel who notified Packard of this suit (R. 1002; Int. 71 at R. 59, 69).

April 16, 1952: Briggs and Beck conferred with Zell (R. 292-3, 552). Beck was authorized to offer Webster a renewal expiring March 31, 1953. Briggs reported that "This particular situation was reviewed in detail and agreed to by Mr. Zell." (R. 1044.) Beck admitted that he assumed he was instructed to make Webster the renewal offer because of Webster's attorney's notice-of-suit letter (R. 286-9).

April 22, 1952: Packard left with Webster a form for renewal of its franchise, to expire automatically March 31, 1953 (R. 976, 289-90, 980-85). It had not been signed by Packard (R. 980-85). If executed by Webster and Packard, it immediately would have increased Webster's "present requirement for net working capital" by $9,000.[1]

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[1] Webster's "delivery quota" in its 1951-'52 Agreement (R. 966) had been *200* cars. "Dealers Delivery Quota" was defined as "the number of units which the Zone Office estimates to be the

May 14, 1952: Zell wrote to Briggs and asked him to supplement with a letter their verbal agreement to eliminate Webster by March 31, 1953 (R. 1003).

June 10, 1952: Armstrong reported to Briggs that he had talked to Zell, had informed him that Webster had been given until the close of business the following day to sign the tendered renewal, and that "Mr. Zell was entirely satisfied and understands that it is not policy for us to give him the letter requested in his letter of May 14, 1952" (R. 1004).

June 11, 1952: Webster's counsel had delivered to Beck a letter advising him that Webster would sign the renewal contract if Packard would only assure Webster (a) that it would deal with him in good faith and (b) that short of some intervening and unpredictable event, there was no reason to believe that Webster could not look forward to annual renewals in the future as in the past (R. 977-9).

Beck read this letter over the phone to Armstrong in Detroit who then dictated a reply (Int. 94, R. 61 and 71) which Beck delivered to Webster's counsel that day (R. 979). Therein he refused to give the assurances of good faith Webster had requested.

June 17, 1952: Beck notified Packard that all programs for Webster "are cancelled immediately" (R. 1152-5, 1030).

June 18, 1952: Beck notified Packard "The Zell Motor Car Company of Baltimore, Maryland, will now handle the Baltimore Metropolitan Area exclusively . . ." (R. 1008).

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reasonable annual total sales potential of Packard Cars by Dealer" (R. 968; R. 627-8). The renewal offered (R. 985) would have raised Webster's "delivery quota" almost 50% to *291* cars. This "quota" increase would have caused Webster's "present requirement for net work capital" to jump from $36,000 to $45,000 (R. 966-7; R. 985).

April 1-June 18, 1952: Webster's franchise terminated on March 31, 1952. Therefore, its cause of action had accrued by April 1st or, at the latest, by April 3rd, when Beck told Mr. Webster "that it was the full intention of the Packard Motor Car Company that he should liquidate his Packard business in Baltimore".

During the period between April 1st and June 18th, while Webster was trying to persuade Packard to renew in good faith, it had been taking other steps to minimize damages (R. 203-5, 352-5). It had continued to advertise on a "business as usual" basis (R. 1143). It had continued to buy cars from Packard (R. 1072; Packard's franchise form provided that such post-termination purchases would not constitute renewal of the dealer's franchise, R. 967). But after June 18, 1952, being cut off entirely by Packard, Webster sought other means to minimize damages (R. 139).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. [redacted] 213

THE WEBSTER MOTOR CAR COMPANY,
Petitioner,

v.

PACKARD MOTOR CAR COMPANY, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD L. SMITH
JEROME G. SHAPIRO
One Wall Street
New York 5, New York

ROBERT W. BARKER
744 Jackson Place
Washington 6, D. C.

Attorneys for Respondents

INDEX

	PAGE
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
Proceedings Below	2
Principal Contentions	3
Summary of Principal Facts	4
Absence of Issues of Fact	5
ARGUMENT	7
A. The Causation Ground of the Decision	7
B. The Antitrust Ground of the Decision	8
1. There is no conflict with the decision of any other court of appeals on the same matter	8
2. The decision below is not in conflict with any applicable decision of this Court and does not involve any important question of federal law which has not been, but should be, settled by this Court	9
a. The *Cellophane* case	9
b. The Rule of Reason	10
c. The *General Motors* case	12
CONCLUSION	12
APPENDIX	13
The Complaint	13
Principal Facts Upon Which Webster Relied to Show That There Was a Conspiracy to Violate the Antitrust Laws	14

PAGE

Principal Facts Upon Which Respondents Relied to Show That There Was No Conspiracy to Violate the Antitrust Laws 17

Effect of Zell's Becoming Sole Dealer 20

Proximate Cause of Alleged Injury to Webster 22

TABLE OF CASES

Feddersen Motors, Inc. v. Ford, 180 F. 2d 519 (10th Cir. 1950) 8

Hudson Sales Corp. v. Waldrip, 211 F. 2d 288 (5th Cir. 1954), *cert. denied* 348 U. S. 821 (1954) 8

Schwing Motor Company, Inc. v. Hudson Sales Corporation, 239 F. 2d 176 (4th Cir. 1957) 8

United States v. duPont & Co., 351 U. S. 377 (1956) 9, 10

United States v. duPont & Co., 1 L. Ed. 2d 1057 (1957) 9, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

THE WEBSTER MOTOR CAR COMPANY, *Petitioner*,	
v.	No. 1113
PACKARD MOTOR CAR COMPANY, *et al.*, *Respondents*.	

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

This brief is filed by respondents, Packard Motor Car Company (hereinafter referred to as "Packard"), Marshall Beck and C. M. Porter, in opposition to the petition of The Webster Motor Car Company (hereinafter referred to as "Webster") for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on April 18, 1957.

QUESTIONS PRESENTED

1. Was the court below correct in holding, as an alternative and completely dispositive common law ground of decision apart from any antitrust question, that the alleged acts complained of gave rise to no claim because Webster rejected the usual one-year renewal of its dealership agreement?

2. Was the court below correct in holding that there was no violation of the antitrust laws where a small automobile

manufacturer, for the purpose of protecting and improving its competitive position vis-a-vis manufacturers of other makes in a city, made one of its dealers the sole dealer in the city, pursuant to an agreement with that dealer, by failing to renew expiring agreements with other dealers there?

3. Was the court below correct in holding that an otherwise legal elimination of all but one of the dealers of an automobile manufacturer in a city for the purpose of giving the remaining dealer an exclusive dealership there was not made illegal under the antitrust laws by the fact that the remaining dealer had requested the exclusive dealership?

4. Was the court below correct in holding that, since there were automobiles of other manufacturers reasonably interchangeable by consumers for the same purposes as Packard automobiles which composed a very small segment of the automobile market, an exclusive contract for the marketing of Packards in one city did not create an illegal monopoly?

STATEMENT OF THE CASE

A separate statement of the case is made necessary by numerous inaccuracies* and important omissions in Webster's statement.

Proceedings Below

The decision below was on an appeal to the United States Court of Appeals for the District of Columbia from a treble damage judgment of the United States District

*An illustration of such inaccuracies appears on page 33 of the petition. There, in paragraph A, Webster states that the evidence warranted the jury in finding certain facts respecting the relationship between Zell and Webster from 1937 to 1942. The principal record reference cited is "R. 1053-4", a document dated August 31, 1938. This document was Plaintiff's Exhibit 122 *for Identification*. It was excluded from evidence upon objection (R. 619).

Court for the District of Columbia in the amount of $570,000 with costs, and from an order awarding an attorneys' fee in the additional amount of $45,000 (R. 118, 119, 149).

The judgment had been entered on the verdict of the jury in an action under the antitrust laws tried before the Honorable Alexander Holtzoff (R. 118).

Respondents had moved unsuccessfully for a mistrial because of conduct of the court below which they had deemed improper and prejudicial (R. 832); for a directed verdict at the end of plaintiff's case (T. R.* 1002; R. 466), and at the close of all the evidence (T. R. 1765; R. 837); for judgment notwithstanding the verdict under Rule 50(b) of the Rules of Civil Procedure (R. 119, 136); and for a new trial (R. 122, 149). The opinion denying the latter two motions (R. 130) is reported at 135 F. Supp. 4. The majority and dissenting opinions of the court below are reported at 243 F. 2d 418.

The court below reversed the decision for error in denial of respondents' motion for judgment. It held that no violation of either Section 1 or Section 2 of the Sherman Act had been shown and held further that, in any event, no damage had been inflicted on Webster because Webster had rejected the usual one-year renewal of its dealership agreement. In view of its conclusion that respondents are entitled to judgment, the court did not reach the question presented as to whether a new trial should be granted because of errors and abuse of discretion at the trial.

Principal Contentions

Webster, a former Packard dealer in Baltimore, contended that it was forced out of business as a Packard dealer as the result of an alleged conspiracy between Packard and Zell Motor Car Company (hereinafter sometimes referred

*References to the typewritten record not printed appear as "T. R. .....".

to aid "Zell", another Packard dealer in Baltimore, to violate the antitrust laws by giving Zell a "monopoly" of Packard sales and service in Baltimore as the sole Packard dealer there.

Respondents contended, among other things, that there was no violation of the antitrust laws, and that Webster was not forced out of business as a Packard dealer, but, on the contrary, gave up its Packard dealership because it preferred the gamble of the present lawsuit.

Summary of Principal Facts

The principal facts in the case are set forth in detail with record references in the Appendix hereto (pp. 13-22, *infra*). The following is a summary of the principal facts:

Zell, one of Packard's largest and best dealers, told Packard it was losing money and asked Packard to make Zell the sole Packard dealer in Baltimore, indicating that unless made the sole dealer there it would quit. Packard decided to comply with Zell's request.

Packard was impelled to its business decision to make Zell sole dealer by the belief that Zell's intention to quit, if not made sole dealer, required it to choose between Zell and Webster; that it was very important to keep a dealer like Zell; that Webster had not been a satisfactory dealer; that Zell was much better qualified than Webster to be sole dealer; that Zell would improve Packard's then unsatisfactory competitive position in Baltimore; and that Zell would give the public the benefit of vigorous price competition.

Packard was one of the comparatively small automobile manufacturers. Packard's decision to make Zell the sole dealer in Baltimore was a normal business decision, and such a decision is commonplace in the automobile industry. It was not Packard's purpose to restrain trade or create a monopoly. Packard's purpose was to protect and improve its

competitive position vis-a-vis other automobile manufacturers in Baltimore and thus promote competition. This purpose was accomplished.

The market in which Zell operated was not a Packard market; it was an automobile market. Zell, as sole dealer, lacked power to fix prices or otherwise control this or any other market. There was no increase in prices or other injury to the public after Zell became sole dealer. On the contrary, the public got the benefit of more vigorous price competition and lower prices after Zell became sole dealer than it had before. There was no reduction in the flow of interstate commerce. On the contrary, the number of Packard cars sold in Baltimore increased.

The acts complained of were not the cause of Webster's ceasing to be a Packard dealer. It ceased to be a Packard dealer because it rejected Packard's offer of renewal.

Absence of Issues of Fact

The controlling issues were issues of law for the court rather than issues of fact for the jury. This is confirmed by the following statements of the trial court:

[Before the introduction of any evidence]

> "* * * As I understand the conspiracy, it is a conspiracy between Zell and Packard to take away the franchise from competing dealers and give Zell an exclusive franchise. So it looks to me as though *eventually it will come down to a question of law* as to whether those facts are or are not actionable under the antitrust laws, whether they do or do not constitute a violation of the antitrust laws. So that on the question of liability it is not unlikely, as I envisage the case, that it will probably go off on *a directed verdict one way or the other.*" (R. 157)

"* * * As I conceive the cause of action, it must be this: * * * that the plaintiff claims that when Zell came to Packard and said, 'I won't handle Packard cars any more unless you take away the franchise from Webster and give me the exclusive franchise,' and Packard acquiesced, that was an unfair restraint of trade. Packard in a sense did not act voluntarily. Is this the contention?

"Mr. Leahy [Webster's counsel]: That's the contention.

"The Court: *Then it will come down to a question of law* as to whether that is or is not a restraint of trade banned by the antitrust laws. * * *" (R. 158-9)

[During presentation of plaintiff's case]

"* * * That's a *question of law*, isn't it, whether this arrangement that was actually made, *whether that's a business arrangement permitted by the Sherman Act*, or whether it is banned by the Sherman Act. * * *" (R. 301)

[During presentation of defendants' case]

"* * * As I have followed the testimony so far, and I have checked my recollection of it by reading the transcript since the last session, *I do not find that there is a dispute concerning a single fact.* * * *" (R. 611). [Substantially the same statement as that italicized was made five times in the same colloquy (R. 611-12).]

"* * * Gentlemen, we have taken quite a bit of time with this case, and I hope we can bring it to a conclusion. I am going to repeat something I said before: *I haven't yet seen a single disputed fact in this case.* * * *" (R. 758)

[On the application for an attorneys' fee after judgment]

> "* * * when the testimony ended in this long trial *there wasn't a single fact in dispute.* * * *" (T. R. 1990)

ARGUMENT

The decision below was based on the alternative grounds (a) that, as a matter of general common law, the alleged acts complained of were not the proximate cause of any injury to Webster, and (b) that, as a matter of antitrust law, it was not illegal for Packard, a relatively small manufacturer competing with large manufacturers, to make its largest dealer in Baltimore the sole dealer there in order to retain that dealer and thus more effectively to compete with other manufacturers. There is no reason for review of the decision below on either ground.

A. The Causation Ground of the Decision

Nowhere in its petition does Webster mention the fact that the reversal below rested on the alternative ground that, as a matter of general common law, the alleged acts complained of "inflicted no damage" because Webster rejected the usual one-year renewal of its dealership agreement. The court below summarized the facts in this connection as follows:

> "* * * After Webster protested and threatened suit, Packard offered Webster the usual one-year renewal but refused to promise more. Packard told Zell, in effect, that this would be Webster's last renewal. Webster declined Packard's offer, quit the business, and brought this suit."

The alternative ground of the decision was stated by the court below as follows:

> "3. Though Packard had formerly expressed an intention not to renew its contract with Webster, Packard offered and Webster refused the usual renewal. That Packard had agreed with Zell not to renew Webster's contract again when the proffered renewal expired is immaterial, not only because the agreement was legal but also because it inflicted no damage."

This alternative ground involved a simple non-federal question as to the legal effect of Webster's refusal of the usual renewal of its dealership agreement. The decision on this ground was clearly correct. In any event, Webster has presented no reason, and no reason exists, why this Court should review the decision below on this completely dispositive issue.

B. The Antitrust Ground of the Decision

In so far as the issues in the present case involved questions under the antitrust laws, there also is no reason why this Court should review the decision below.

1. There is no conflict with the decision of any other court of appeals on the same matter.

Webster fails to show any conflict between the decision below and the decision of any court of appeals. In fact, the decision below is in harmony with all court of appeals authority on the same matter. *Schwing Motor Company, Inc.* v. *Hudson Sales Corporation*, 239 F. 2d 176 (4th Cir. 1957); *Hudson Sales Corp.* v. *Waldrip*, 211 F. 2d 268 (5th Cir. 1954); *cert. denied* 348 U. S. 821 (1954); *Feddersen Motors, Inc.* v. *Ward*, 180 F. 2d 519 (10th Cir. 1950).

2. The decision below is not in conflict with any applicable decision of this Court and does not involve any important question of federal law which has not been, but should be, settled by this Court.

Webster bases its petition essentially on contentions (a) that the decision below is in conflict with and constitutes a misapplication of *United States* v. *duPont & Co.*, 351 U. S. 377 (1956) (the *Cellophane* case), (b) that the court below failed to apply the rule of reason and (c) that the decision below conflicts with *United States* v. *duPont & Co.*, 1 L. Ed. 2d 1057 (June 3, 1957) (the *General Motors* case).

a. The *Cellophane* case

Webster relies upon the monopoly concept for proof of violation of both Section 1 and Section 2 of the Sherman Act, treating Zell's alleged "monopoly" in Baltimore as the essential element of unreasonable restraint of trade. The first of Webster's Questions Presented (p. 2) is as follows:

> "Whether an agreement or conspiracy between a manufacturer and its largest dealer, at the instigation of the latter, to eliminate the dealer's competitors, *for the purpose of giving the dealer a monopoly* in the sale of the manufacturer's product, is immunized as a matter of law from the prohibitions of *sections 1 and 2 of the Sherman Act* on the theory that the manufacturer might have unilaterally decided to grant an exclusive dealership." [Italics supplied.]

Webster contends that the court below in considering the question of "monopoly" ignored a jury decision on the scope of the relevant market in deference to the following statement of this Court in the *Cellophane* case (p. 393):

> "* * * However, this power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product."

However, what the court below did was not to ignore the jury decision but rather to do what it was required to do: it determined whether there was sufficient evidence to support the verdict.

On the record before it in this case, the court below held correctly that there was no evidence to support a jury decision that the relevant market was a Packard market. Indeed, the overwhelming undisputed evidence in the record compelled the conclusion that the relevant market was the automobile market (R. 475, 493-4, 498-9, 668-9, 671, 672-3, 704-5, 193, 207, 361, 376-7, 452; Def. Ex. 26, R. 1131).

There is no basis for any contention by Webster that the court below misapplied the principles of the *Cellophane* case. The court below correctly applied such principles to the record in the present case, concluding:

> "* * * Since there are other cars 'reasonably interchangeable by consumers for the same purposes' as Packard cars and therefore in competition with Packards, an exclusive contract for marketing Packards does not create a monopoly. And there is no evidence of any attempt or conspiracy to create a monopoly, since there is no evidence of any attempt to get control of the relevant market."

b. The Rule of Reason

Webster contends that the court below, in considering whether there was a violation of Section 1 of the Sherman Act, ignored the rule of reason and substituted a doctrine of

per se legality. Webster's whole argument in this connection is based upon a distortion of the court's decision.*

The court below did not purport to hold that exclusive dealerships are legal *per se*. The language upon which Webster bases it argument in this connection is contained in a quotation from Professor Handler's Annual Antitrust Review and is to the effect that, prior to the decision below, "the rule was virtually one of *per se* legality". This language does not express the basis of the court's conclusion that there was no violation of Section 1 here. Far from applying any *per se* rule, the court recognized the necessity of determining whether there was sufficient evidence to permit the jury to find that there was an unreasonable restraint of trade, and rested its conclusion on a careful analysis of the undisputed facts.

On the basis of the undisputed facts, the court below reached the following conclusion:

> "The short of it is that a relatively small manufacturer, competing with large manufacturers, thought it advantageous to retain its largest dealer in Baltimore, and could not do so without agreeing to drop its other Baltimore dealers. To penalize the small manufacturer for competing in this way not only fails to promote the policy of the antitrust laws but defeats it."

---

*To accomplish this distortion Webster resorts to the following misleading use of quotation marks, attributing to the court below language which it never used:

"* * * In such circumstances, the Court declared, exclusive dealerships are '*per se* lawful' * * *" (p. 6)

"* * * the court below has invented a rule of '*virtual per se legality*' * * *" (p. 8)

"No court has ever before announced the doctrine that exclusive dealerships are 'virtually *per se legal*.'" (p. 13)

"* * * None of the other cases relied on by Packard supported the doctrine that exclusive dealerships are 'virtually *per se* legal'." (pp. 21-2)

Thus the decision below involved neither the enunciation nor the application of a *per se* rule as to liability under Section 1 of the Sherman Act.

c. The *General Motors* case

Webster contends (p. 3) that the decision below, in conflict with the decision of this Court in the *General Motors* case,

> "* * * limits sections 1 and 2 of the Sherman Act to horizontal conspiracies between dealers, ruling out as non-actionable a vertical conspiracy between a manufacturer and a dealer to eliminate competition between dealers."

There is nothing in the majority opinion or the dissenting opinion which suggests that the decision below either involves such a limitation or is grounded upon a distinction between horizontal and vertical conspiracies.

CONCLUSION

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

HAROLD L. SMITH
JEROME G. SHAPIRO
One Wall Street
New York 5, New York

ROBERT W. BARKER
744 Jackson Place, N. W.
Washington 6, D. C.
Attorneys for Respondents

APPENDIX

The Complaint

The complaint alleged, among other things, that Packard conspired with Zell for the purpose of giving Zell "a monopoly of the 'authorized' Packard sales and service business in Greater Baltimore", (par. 51, R. 15); that Packard informed Webster that its Dealer's Sales Agreements [made in standard printed form (R. 473)] would not be renewed (par. 65, R. 22); that Webster repeatedly requested renewal (par. 67, R. 22); that on June 4, 1952 Packard wrote Webster a letter which stated that the one-year term of Webster's agreement expired March 31, 1952, stated that on April 22, 1952 Packard had left with Webster the 1952-1953 renewal amendment [a standard printed form for one-year renewal (Pl. Ex.* 22, R. 980; R. 79)] which would extend the agreement another year, and stated that the amendment would not be accepted unless Webster signed and returned it by June 11, 1952 (par. 74, R. 25); that on June 11, 1952 Webster's attorney wrote Packard a letter which stated that Webster would sign the renewal amendment if it received certain "formal assurances" with respect to further renewals [the "assurances" demanded would have been collateral to the standard agreement (Pl. Ex. 6; Pl. Ex. 22, R. 980)] (par. 75, R. 25); that Packard's reply to this letter was as follows:

> "Regarding your letter of June 11, 1952, the entire terms of our offer to Webster Motor Car Company are contained in our letter to that company dated June 4, 1952. No commitment has been nor will be made with reference to any alleged understanding not contained in the proposed written

*References to plaintiff's exhibits appear as "Pl. Ex. .....".

> amendment referred to in our letter of June 4, 1952." (par. 75, R. 27);

that

> "Thereupon plaintiffs were forced to desist in their efforts to find an amicable solution to their grievances against Packard and advised the latter that having been forced out of the Packard business they would file suit for redress * * *." (par. 76, R. 27);

and that, as the intended and actual result of the conspiracy, Webster's agreement was terminated, and Zell acquired a monopoly of all "authorized" Packard business in Greater Baltimore (par. 79, R. 28).

Principal Facts Upon Which Webster Relied to Show That There Was a Conspiracy to Violate the Antitrust Laws

As evidence of the alleged conspiracy, Webster relied primarily on what occurred at two conferences which Sidney Zell, President of Zell (R. 5), had with Packard representatives and decisions made by Packard on the subjects of the conferences. The essential facts in this connection are not in dispute.

The first conference was in September, 1951. Those present were Mr. Zell, E. J. Platfoot, Packard's Eastern Division Sales Manger, and Marshall Beck, Packard's Washington Zone Manager (Def. Ex.* 17, R. 1080, 1081; R. 479, 77). At that time Packard had four dealers in the Baltimore area: Webster, Zell, DeBaugh (a marginal dealer who sold only 10 cars that year (Def. Ex. 81B, R. 1165)) and Schulte Motor Sales, Inc., hereinafter sometimes referred as to "Schulte" (R. 76-7). Schulte was quitting; he later signed a mutual cancellation agreement which became effective January 11, 1952 (Def. Ex. 17,

*References to defendants' exhibits appear as "Def. Ex. .....".

R. 1080, 1081-2; Def. Ex. 20, R. 1085; Pl. Ex. 29A, R. 993; R. 563, 940).

This conference concerned a decision of Packard as to whether to appoint a new dealer to succeed Schulte. The discussion at the conference is described in a memorandum from Mr. Platfoot to Clare E. Briggs, Packard's General Sales Manager (R. 77). This memorandum (Def. Ex. 17, R. 1080, 1082-3) was, in part, as follows:

> "Due to the fact that Mr. Zell is familiar with this mutual cancellation from Schulte Motor Sales, Incorporated, he was very much interested in knowing whether we were going to put another dealer in Baltimore because he wanted to make his plans immediately. By that he meant that he would give up the Packard franchise because year-to-date the return on his investment has been very small, and with the possibility of a shortage of cars, he feels he would lose money.
>
> "He assured us that if we would go along for the present time with only two dealers and not install a third one, he would set up an organization with our assistance and would make up the 100 cars that Schulte has sold this year. * * *
>
> "At this particular point a decision had to be made since Schulte was going out of business and if Zell decided to do likewise, it would leave us with only one dealer in the city of Baltimore, and not a very strong one at that. From our experience in the past year, I believe you will agree that it is rather difficult due to the uncertainty of the times to get a new dealer as large as Mr. Zell. I am sure that in losing Mr. Zell we would lose a great deal of prestige and very likely would not be able to get the facilities that Mr. Zell now has.
>
> "Mr. Zell was very serious in his conversation and said that we have never given him an opportunity to show us that his organization can maintain Packard price class, and he felt that he was at least enti-

tled to this request, and if it could not be done, he would bow out graciously. This request has come up before from Mr. Zell, and it has been in his mind for a considerable length of time. I am very sure that he was most serious in his decision in relinquishing the Packard franchise.

"This I agreed upon, and I am sure that I am correct. Under the circumstances, I agreed with Mr. Zell and Mr. Beck not to appoint another dealer in Baltimore for the present and, therefore, give Mr. Zell the opportunity to prove that he can do the job. * * *"

The second conference was on January 29, 1952, four months after the first (R. 77, 558-9). It took place in New York City, while several Packard employees were there attending an N. A. D. A. convention (R. 478-9, 558-9, 581-3). The Packard employees present were Clare E. Briggs, General Sales Manager; Roy Abernethy, Assistant General Sales Manager in Charge of Eastern Division; Leroy Spencer, Executive Vice President; Leo E. Fenn, new Eastern Division Sales Manager; and Marshall Beck, Washington Zone Manager (R. 77).

The discussion at the New York conference is described as follows in the answer to Plaintiffs' Interrogatory 27c (R. 54, 65), which Webster's counsel introduced and read in evidence:

"27c. Mr. Zell stated that he had been unable to get sufficient volume and had been losing money; that the owner of premises which he leased for a service station was pressing for a renewal and he had to let the owner know about renewal but he refused to sign a new lease until he had had an opportunity to talk with Packard; that he would not continue doing business for Packard in the red and if he were not made sole dealer in Baltimore he would have to quit; that he was confident that if made sole dealer in Baltimore he could improve Packard's price class position there and satisfy Pack-

> ard's demands in Baltimore and he requested an opportunity for a trial period to demonstrate his ability to do so; that in order to obtain a larger percentage of price class in Baltimore he would augment and strengthen his organization and facilities and increase trade-in allowances. The Packard representatives inquired as to Mr. Zell's general set-up, how many employees he had and what he thought he could do if given the opportunity. The Packard representatives told Mr. Zell Packard would take his request under consideration and notify him of its decision. Mr. Zell requested notification within two weeks. Neither Webster nor DeBaugh was discussed."

The discussion is described similarly in the testimony of Messrs. Briggs, Abernethy and Beck (R. 479-80, 559, 576-7, 594-5, 259-61).

Mr. Briggs took Mr. Zell's request under consideration; he discussed it with Mr. Abernethy, with Mr. Armstrong, Mr. Briggs' administrative assistant, and others; and, after considering various reports and other information on the Baltimore situation, he decided that Packard should comply with the request (R. 475-7, 478, 480, 482-3, 487, 560-3, 690-2). He thereupon directed Mr. Abernethy to make Zell the sole dealer in Baltimore (R. 488-9). Mr. Abernethy passed the direction on to Mr. Beck who notified Mr. Zell of Packard's decision (R. 564; Pl. Ex. 33, R. 997).

Principal Facts Upon Which Respondents Relied to Show That There Was No Conspiracy to Violate the Antitrust Laws

Just as there was no dispute as to the principal facts upon which Webster relied to show the alleged illegal conspiracy, so the principal facts upon which appellants relied to show that there was no such conspiracy were beyond dispute.

Packard, one of the so-called "independents", cannot monopolize; it cannot restrain the stiff competition from other makes which it must face. Respondents contended that what Packard did was done for the proper business purpose of protecting and improving its competitive position in Baltimore. The undisputed facts clearly demonstrate this.

There was nothing unusual about Packard's decision to make Zell the sole dealer in Baltimore. Packard had 1600 dealers, 1100 of whom were the sole dealers in their respective cities, some nearly as large as Baltimore (R. 473-4, 487). Sole dealers were not unusual in the industry; indeed, Packard's ratio of sole dealers to total dealers was typical (R. 474, 577). Cadillac had only one dealer in Baltimore (R. 361).

In common with other automobile manufacturers, Packard measures its competitive position by its price-class percentage—a percentage representing Packard's proportion of new cars registered in Packard's "price class", which includes Cadillacs, Lincolns, Chryslers, Oldsmobiles and other makes constituting Packard's principal competition (Def. Ex. 26, R. 1131; R. 671-3, 668-70, 475, 488, 704-5). At the time when Zell requested that it be made the sole dealer in Baltimore, Packard was dissatisfied with its price-class percentage in Baltimore; from a price-class standpoint, Baltimore was what Packard termed one of the "terrible towns" (R. 477, 514, 588; Def. Ex. 10A, R. 1078).

At the time when it considered whether it should comply with Zell's request, Packard had good reason to believe that Webster was not a satisfactory dealer. Mr. Briggs had read reports indicating this (Def. Ex. 15, R. 1073, 1074; Def. Ex. 16, R. 1075, 1076; Def. Ex. 17, R. 1080; R. 474, 475-7, 478), and Messrs. Abernethy and Armstrong had received similar reports at a recent Sales Division meeting (R. 689-90). A very serious fault disclosed by these reports was that Webster was a "tight trader" whose retention of a high

gross profit per car, "abo louble the national average", hurt both Packard and th public by limiting volume and increasing prices (Def. Ex. 5, R. 1073, 1074; Def. Ex. 16, R. 1075, 1076; Def. Ex. 17, R. 1080-1; R. 475-7, 507, 511).

Packard believed that Zell's intention to quit if not made the sole dealer in Baltimore required it to make a choice between Zell and Webster (R. 482-3, 560-1, 562, 690-2, 712). The principal considerations which led to Packard's choice of Zell instead of Webster were as follows:

(1) Packard believed that it was very important to Packard to keep Zell because (a) Zell was a much larger dealer than Webster and was one of Packard's largest and best dealers (R. 482-4, 560-1, 691-2); (b) Zell had a national reputation among dealers and if Packard lost Zell it would lose a great deal of prestige (R. 483-4; Def. Ex. 17, R. 1083); and (c) Packard had difficulty competing with the Big Three for suitable dealers and felt that it could ill afford to lose a dealer like Zell, for which it probably could not get an adequate replacement (R. 484, 487, 519, 563; Def. Ex. 17, R. 1083).

(2) It was Packard's opinion that Zell was, and Webster was not, qualified to be the sole dealer because Packard believed (a) that Zell had, but Webster did not have, adequate facilities, working capital and location to handle Baltimore alone (R. 482-6, 560-1, 691-2)*; and (b) that Zell was aggressive about going after volume and increasing Packard's market penetration, but Webster, being a "tight trader", was not (R. 475-7, 484-5, 507).

(3) Mr. Zell had expressed confidence in his ability as sole dealer to improve Packard's price-class posi-

* A comparison of Zell's and Webster's working capital by months in 1951 is set forth in Defendants' Exhibit 81F (R. 1176).

tion in Baltimore by strengthening his organization and facilities and increasing his trade-in allowances (R. 576-7; *supra*, pp. 16-17). Since, as the trial court observed (R. 573), any manufacturer wants to sell as many units as possible, Packard felt that it was in Packard's interest to give Zell the opportunity to do this (R. 560-1, 572, 576-7).

(4) Packard anticipated that the public as well as Packard would benefit from Zell's becoming the sole dealer in Baltimore because it expected that Zell, being a large volume dealer in need of greater volume to support its large operation, would trade liberally with customers in order to get the volume (R. 485-6, 519-20, 560-1, 576-7, 577-8).

Effect of Zell's Becoming Sole Dealer

Webster's theory is that the public necessarily was injured when there no longer were two Packard dealers in Baltimore competing with each other. As sole Packard dealer in Baltimore, however, Zell had vigorous competition, both from other Packard dealers and from dealers for other makes.

Zell did not have exclusive Packard selling rights (Def. Ex. 37; R. 481-2). Defendants' Exhibit 81C (R. 1166) shows that, during the first year and a half of Zell's sole dealership, 110 persons in Zell's selling area (Def. Ex. 37, R. 1136, 1139) purchased Packards from Packard dealers other than Zell. For example, there was a Packard dealer at Bel Air, Md., from whom many Baltimore people purchased Packards (R. 336).

In any event, Zell's market was not a "Packard" market; it was an automobile market (R. 475, 493-4, 498-9, 668-9, 671, 672-3, 704-5; 193-4, 207, 361, 376-7, 452; Def. Ex. 26, R. 1131). The extent of the competition which Zell

had from dealers for other makes is made clear by Defendant's Exhibit 26 (R. 1131-); it shows that Packard's percentage of its price class in Baltimore in 1953, which did not include Ford, Chevrolet, Plymouth or other low-priced cars (Def. Ex. 27D), was only 8.11%.

In the light of the competitive situation, it is clear that Zell was not in a position as sole dealer to charge excessive prices or otherwise injure the public. On the contrary, the public benefited from Zell's becoming sole dealer and would have been injured if Zell had quit.

Defendants' Exhibit 26 shows that in 1953, the first full year of Zell's sole dealership, Packard's price-class percentage in Baltimore was substantially higher than it had been in 1951, the last full year in which Webster operated as a dealer (Def. Ex. 26, R. 1131; R. 672-5; see also R. 577, 590-1). This price-class improvement, in what then was a buyer's market (R. 705-6, 570-1, 247), indicates that Packard was giving the public the benefit of better price competition than before Zell became the sole dealer.

Defendants' Exhibits 81G and 81H show that Zell's percentage of used cars of other makes taken in trade exceeded Webster's percentage in 1950 and 1951 and increased substantially in 1952 and 1953 (Def. Ex. 81G, R. 1177; Def. Ex. 81H, R. 1178; R. 822). This indicates that while Webster was still operating Zell competed more effectively with other makes than Webster did, and that after Zell became sole dealer its competition with other makes was even more effective than it had been previously.

Comparison of Defendants' Exhibits 81I and 81J shows that during 1950, 1951 and 1952 Zell gave the public better prices than Webster did, and in 1953, the first full year of its sole dealership, Zell gave the public substantially better prices than Zell or Webster had given before. These exhibits indicate the benefit derived by the public from the portion of car gross profits given to customers by the

respective dealers in the form of "trading loss" (R. 1179, 1180; R. 813-14, 815-17, 819-21). From these two exhibits and the other evidence showing Webster to be a "tight trader" (*supra*, pp. 18-19), it is obvious that the public paid lower prices after Zell became sole dealer than it would have had to pay if Zell had quit.

There was no proof of any diminution or inadequacy in the number of new Packard cars moving in interstate commerce and available in Baltimore resulting from Zell's becoming sole dealer. On the contrary, the evidence shows that there were many more new Packard registrations in Baltimore in 1953, the first full year of Zell's sole dealership, than in 1951, the last full year of Webster's dealership; and that Packard's stock of new cars available to Zell in 1953 exceeded substantially that available to Baltimore dealers in 1951 and 1952 (Def. Ex. 26, R. 1131; Def. Ex. 81A, R. 1164; R. 704).

Proximate Cause of Alleged Injury to Webster

Explaining his demand for "assurances" (*supra*, p. 13) in his summation, Webster's counsel said (R. 933):

> "* * * We only asked for the same kind of treatment they were giving every other dealer in the United States, and the same kind of treatment they had given us. * * *"

That is exactly what Packard offered. The proposed renewal amendment was Packard's standard form of one-year renewal (Pl. Ex. 22, R. 980; R. 79). It was the same kind of renewal agreement that Webster had gotten in 1947, 1948, 1949, 1950 and 1951 (R. 665). Webster's agreement always had been on a one-year basis, expiring on March 31st each year unless renewed (R. 217).

Supreme Court of the United States

October Term, 1957

PETITION FOR REHEARING OF A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

	PAGE
Preliminary Statement	1
1. The Conflict Between the Industry and the Justice Department Resulting From the Denial of Certiorari	4
2. The Department of Justice Should Be Invited to File Its Views	9
3. New Conflicts in the Second and Ninth Circuits	10
Conclusion	13
Appendix A: *Flintkote Company* v. *Lysfjord* (C.A. 9) 246 F. 2d 368	14
Appendix B: *Technical Tape Corp.* v. *Minnesota Mining & Manufacturing Co.* (C.A. 2), 247 F. 2d 343	17

CITATIONS

Cases:

Flintkote v. *Lysfjord* (C.A. 9) 246 F. 2d 368 ... 2, 10-12
Lawlor v. *National Screen Service Corp.*, 349 U.S. 322 ... 10
Paramount Film Distributing Corp. v. *Village Theatre* (C.A. 10) 228 F. 2d 721 ... 12
Schwing Motor Co. v. *Hudson Sales Co.*, 138 F. Supp. 899 (D.C. Md.), *aff'd per curiam*, 239 F. 2d 176 (C.A. 4) ... 5-9
Technical Tape Corp. v. *Minnesota Mining and Manufacturing Co.* (C.A. 2) 247 F. 2d 343 ... 2, 10-12
The Webster Motor Car Co. v. *Zell Motor Car Co., et al.* (C.A. [illegible]) 234 F. 2d 616 ... 10
U.S. v. *Crown Zellerbach Corporation*, 1956 Trade Cases, par. 68,544 ... 4
U.S. v. *J. P. Seeburg Corporation*, 1957 Trade Cases, par. 68,613 ... 3
U.S. v. *Memphis Retail Packaging Stores Association, Inc.*, 1956 Trade Cases, par. 68,383 ... 4

PAGE

U.S. v. *Michigan Tool Company, et al*, 1956 Trade Cases, par. 68,290 3

U.S. v. *National Linen Service Corporation*, 1956 Trade Cases, par. 68,398 3

U.S. v. *Philco Corporation*, 1956 Trade Cases, par. 68,409 ..... 3, 4

U.S. v. *Rudolph Wurlitzer Co.*, 1957 Trade Cases, par. 45,057, page 66,306 4

Miscellaneous:

Automotive News 5-9

Hearings before the House Committee on Interstate and Foreign Commerce, relating to Automobile Marketing Legislation, July 6, 1955 ..... 3, 5

"The Automobile Marketing Practices Study", a Report of the Subcommittee on Automobile Marketing Practices of the Senate Committee on Interstate and Foreign Commerce, January 19, 1956 4

In The

Supreme Court of the United States

October Term 1957

No. 213.

The Webster Motor Car Company,
Petitioner

v.

Packard Motor Car Company; et al.,
Respondents

PETITION FOR REHEARING OF A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Preliminary Statement

Throughout the automotive industry and in legal circles the denial of certiorari in this case is being given an interpretation and significance far different from anything this Court had any reason to envision. It is so disruptive of business practices and Department of Justice enforcement policies as to make review a matter of real public importance.

Also, since the filing of the petition herein, decisions of the United States Courts of Appeal in the Second and Ninth Circuits have been published in the advance sheets

which are in accord with the treatment of this case in the District Court and in conflict with the majority decision below.[1]

Until the denial of certiorari in the present case, industry had acquiesced in the Government's position that the antitrust laws prohibit manufacturer-dealer arrangements for the purpose of restraining or preventing competition between existing dealers selling the same product in competition with each other. Now, the denial of certiorari in the present case is being interpreted as a rejection by this Court of the Government's interpretation of the antitrust laws, and an invitation to ignore the Government viewpoint.

Not only has the Department of Justice opposed all agreements which are directed to restraint or destruction of competition between dealers in the *same* market selling the same trademark or brand commodity; it has gone much further. It has forbidden all manufacturer-dealer agreements which would restrain or destroy even that competition which exists between dealers in *different* markets or territories selling the same make.

The Attorney General, the Honorable William P. Rogers, in opposing a proposed "territorial security" bill for automobile dealers in 1953 expressed the Department's position as follows:

> ". . . The Department of Justice, however, consistently opposes attempts, by industry action or legislation, to impose any limitations or restrictions upon the persons to whom, or the territory within which, an independent business man may resell a purchased commodity. We believe any such restrictions are of an anti-competitive nature, inimical to the public in

[1] *Flintkote v. Lysfjord* (C.A. 9) 246 F. 2d 368; *Technical Tape Corp. v. Minnesota Mining & Manufacturing Co.* (C.A. 2) 247 F.2d 343.

terest and contrary to the basic philosophy of the antitrust laws."[2]

This policy has been implemented by consent decrees in various industries.[3]

The argument is now being widely advanced that the denial of certiorari in the present case is a blessing of the right of a dealer (Zell) in a stated area (Baltimore) to coerce his manufacturer (Packard) into elimination of all existing fellow-dealer competition in the area (from Webster and DeBaugh); and that it is but a corollary that agreements limiting the areas in which dealers may sell, or penalizing them for selling in areas assigned to other dealers, are lawful.

If this Court has any doubt that the Antitrust Division of the Department of Justice considers the decision of the Circuit Court below to be (1) incorrect and (2) an impairment of its task of enforcing the antitrust laws, we urge that the Department be invited to file a statement of its position. After all, the Department, not private parties, has the primary responsibility of enforcing the antitrust laws.

The public importance of review of the present case by this Court has been magnified by the conflict between the decision below and decisions of the Courts of Appeal of the Second and Ninth Circuits reported in advance sheets after the filing of the petition herein. The cases are discussed at pp. 10 to 12, below.

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[2] Hearings before the House Committee on Interstate and Foreign Commerce, relating to Automobile Marketing Legislation, July 6, 1955, p. 9.

[3] For example: *U.S. v. J. P. Seeburg Corporation*, 1957 Trade Cases, par. 68,613 (phonographs); *U. S. v. Michigan Tool Company, et al*, 1956 Trade Cases, par. 68,290 (gear cutting machines); *U. S. v. National Linen Service Corporation*, 1956 Trade Cases, par. 68,398 linen supplies); *U. S. v. Philco Corporation*;

1. *The Conflict Between the Industry and the Justice Department Resulting From the Denial of Certiorari*

A very large number of the 42,000 franchised new car dealers in this country have declared their desire for so-called "territorial security" agreements, under which manufacturers would be permitted to agree with dealers to give them protection within their prescribed territories from the competition of fellow-dealers selling the same make of car, parts, accessories and service.[4]

It is not difficult to understand why a well-established, high-overhead Ford dealer in downtown Washington might like to have the manufacturer agree to protect him from the competition of a relatively low-overhead Ford dealer in Laurel, Md., twenty miles away. However, it is equally understandable that the Laurel dealer would not appreciate being restrained or prevented from selling merchandise he owns anywhere he wants to, so long as he sells and services it in such way as to protect the manufacturer's good will. Of even greater fundamental importance is the right of a Washington buyer to purchase his Ford from a low-overhead, good-service, Ford dealer in Laurel at a substantial saving in money.

In 1955 a bill was introduced in Congress for the specific purpose of exempting territorial security agreements

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1956 Trade Cases, par. 68,409 (radios, television sets, etc.); *U. S. v. Crown Zellerbach Corporation*, 1956 Trade Cases, par. 68,544 (paper towels and dispensing cabinets); *U. S. v. Memphis Retail Packaging Stores Association, Inc.*, 1956 Trade Cases, par. 68,383 (alcoholic beverages). Cf. restatement of Department of Justice position in *U. S. v. Rudolph Wurlitzer Co.*, 1957 Trade Cases, par. 45,057, page 66,306 (coin operated phonographs).

[4] "The Automobile Marketing Practices Study", a Report of the Subcommittee on Automobile Marketing Practices of the Senate Committee on Interstate and Foreign Commerce, January 19, 1956; pp. 1, 7.

in the automobile field from the anti-trust laws.[5] It was opposed by the Department of Justice, the Federal Trade Commission and others.[6] The bill was not reported favorably by either house, let alone enacted.

Then the Circuit Courts decided the *Webster* and *Schwing*[7] cases. Certiorari was promptly sought.

In the September 30, 1957, issue of *Automotive News*, the leading automotive trade journal, a three-column, headline article entitled "Cancellation Cases at Zero Hour" reported:

> ". . . A Big Three attorney who has followed the cases [the *Webster* and *Schwing* cases] through the Federal judiciary expressed the opinion that a Supreme Court refusal to review the cases, or a decision upholding the factories, might clarify application of the antitrust laws to the closed-territory practice.
>
> "'There may be no need for further territory security legislation,' he said, 'if, as a matter of law, an automobile manufacturer may give an automobile dealer the amount of territorial security from fellow dealers as the Circuit Court of Appeals said Packard could give Zell and Hudson could give Bankert.
>
> "'It might be possible to resume the practice of designated or closed territories, should the Supreme Court rule against Schwing and Webster, without asking Congress for a new law or an amendment to present antitrust laws.'"

At about this same time in September-October 1957, the Department of Justice was considering two territorial-

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[5] H.R. 6544, 84th Cong., 2d Sess. at p. 2 of Hearings before the House Committee on Interstate and Foreign Commerce, July 6, 1955.

[6] Hearings before the House Committee on Interstate and Foreign Commerce, relating to Automobile Marketing Legislation July 6, 1955, pp. 8-9.

[7] *Schwing Motor Co.* v. *Hudson Sales Co.*, 138 F. Supp. 899 (D.C. Md.), *aff'd per curiam*, 239 F.2d 176 (C.A. 4).

security plans, one proposed by the National Automobile Dealers' Association (NADA), the other by the Authorized Dealers' Survival Association (ADSA). Under NADA's plan the dealer's cost per new car would have been increased $100, and the manufacturer, in turn, would have rebated that sum to the dealer for each new car he sold to a resident of his prescribed "territory." The ADSA plan would have authorized the manufacturer to pay the dealer a bonus of 5% of the factory list price for the new cars he sold to residents of his "territory." The Department of Justice opposed both plans.

Neither the NADA nor ADSA plans went nearly as far as legalizing an agreement between a manufacturer (Packard) and a requesting dealer (Zell) to terminate the franchises of all competing dealers handling the same make of car (Webster and DeBaugh) in the same market (metropolitan Baltimore).

On October 14, 1957, prior to knowledge of denial of certiorari in the present case, *Automotive News* carried a front-page two-column headline article, reporting in part as follows:

> "The Department of Justice last week forced NADA and ADSA to look around for new plans and approaches to a 'service responsibility' program acceptable to the manufacturers and antitrust policemen.
>
> "Assistant U. S. Attorney General Victor R. Hansen, head of the department's antitrust division, opined that both the rebate and bonus plans for in-territory selling, as proposed by NADA and ADSA, respectively, would likely run afoul of Federal antitrust statutes."

A week later, *Automotive News*, in reporting the denial of certiorari in the *Webster* and *Schwing* cases, made the following significant statements (front page, three columns):

"SUPPORT GROWS FOR SUIT
TO TEST SECURITY PACTS

"A U. S. Supreme Court decision bolstered sentiment last week for a 'friendly' court test of territory security.

"The decision, which served to uphold exclusive-dealer agreements, was viewed by numerous key dealers and legal experts as a possible rebuff to the thinking behind anti-territory security policies of the Justice Department.

• • • •

"The Supreme Court injected new fire into the territory-security debate when it refused to review the *Webster* and *Schwing* lawsuits against Packard and Hudson, respectively.

• • • •

"The denial of the dealers' petitions thus upheld as binding two Circuit Court of Appeals decisions which had affirmed the factories' right to appoint exclusive or preferred dealers for a designated market—in these cases, the City of Baltimore.

• • • •

"A 'definite divergence' between the Federal courts and the Justice Department on the territory-security issue was noted by a legal expert who has followed the *Schwing* and *Webster* cases since their beginnings in lower U. S. courts.

"'The Justice Department,' he explained, 'keeps saying that any plan to fence in dealers and pay them bonuses for sales inside the boundaries is illegal. Yet, the Federal judges uphold two factories who pursued the principle on which territory security would be based.

"'It would seem that the attorney general is defining public policy not law. The law, as the courts see it, upheld territory security before and still does.'

• • • •

"The legal conflict stirred up new demands for a court test of a proposed territory-security plan.

• • • •

"An NADA director from a large midwestern state said that the Supreme Court position 'makes it imperative that we straighten this legality thing out.'

"'For years,' he said, 'we've gone along on the opinions of the Justice Department. But the courts decide the other way. Let's find out in the courts once and for all, so we'll know whether we need new legislation or not.'"

On October 28, 1957, the *Automotive News* reported:

"ADSA officials maintained that Hansen's statement was 'one lawyer's opinion, and not necessarily conclusive.' The ADSAers were encouraged by the apparent leaning of the Federal judiciary, as evidenced in the *Schwing* and *Webster* decisions this month, toward a closed-territory philosophy under the antitrust laws."

By refusing to endorse the NADA and ADSA territorial security plans the Justice Department has inferentially, but forcefully, pronounced its continuing disagreement with the decision of the Circuit Court in the *Webster* case. Thus the thousands of new car dealers who claim they desperately need territorial security are caught in the cross-fire of uncertainty created by the conflict between the views of certain Circuit Courts and the Justice Department.

The following critical dilemma has been created:

How much territorial security may automobile manufacturers agree to give their franchised dealers without violating the antitrust laws?

a. The great amount approved by the Circuit Court in the *Webster* case?

b. The more moderate amount sought by NADA and ADSA?

c. Or practically none, as proclaimed by the Justice Department and Federal Trade Commission?

There is nothing to indicate that the industry's confusion is abating. According to the November 4, 1957, "*Automotive News*", p. 2, the Missouri, Wisconsin and Illi-

nois Automobile Dealers Associations have just adopted separate resolutions urging that the Justice Department's opposition to territorial security be put to a court test.

> "The Wisconsin group reaffirmed its position last week by alluding to the 'difference in viewpoint between the U. S. Supreme Court and the Antitrust Division attorneys on the questions of protected territory and closed territory.' . . . The Wisconsin association said the Supreme Court departed from the Justice Department's thinking last month when it ruled, in effect, that factories could limit the number of dealers in any particular area. This ruling came in appeals of the *Webster* and *Schwing* antitrust damage suits against Packard and Hudson, respectively."

By reviewing this case, and, perhaps inviting the Department of Justice to file a brief, this Court can give sorely-needed guidance to a bewildered but important segment of our economy—the entire automobile industry. Many other industries distributing their products through competing franchised dealers are similarly involved.

2. *The Department of Justice Should Be Invited to File Its Views*

If there is any doubt that the Department of Justice considers the opinion of the Circuit Court below to be both incorrect and an obstacle to enforcement of the antitrust laws, we urge that the Department be invited to file its views with this Court.

It is perhaps understandable that ordinarily the Department would wish to refrain from taking sides in private litigation. And yet, if the Antitrust Division intends to pursue policies which thousands of new car dealers believe to be in conflict with the decisions of the Court of Appeals here and in the Fourth Circuit, an explanation is in order. Otherwise the great number of franchised automobile dealers vitally interested in

this matter will have every reason to feel "that the Attorney General is defining public policy, not law."

Had the Government proceeded in the District Court against Packard (and even if, unlike petitioner, it had lost there), a right of direct appeal would have brought the case promptly to this Court (15 U.S.C. 29). We pray that some weight will be given to the fact that instead of riding on the Government's coattails, or waiting to follow in the wake of a Government antitrust victory, petitioner, at its own expense and after the destruction by respondents of its business which the jury valued at $190,000, diligently pursued both Packard and Zell through *two* Circuit Courts [see *The Webster Motor Car Co.* v. *Zell Motor Car Co., et al* (C.A. 4), 234 F.2d 616].

Granting to petitioner a right to Supreme Court review would give great substance to Chief Justice Warren's pronouncement in *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322 at 329, that treble damage actions are an important aid to the enforcement of the antitrust laws. Certainly no such aid will exist if one in Webster's position is denied review of a case so important in view of the industry reaction above described and the recent conflicts next to be described,—a case which in the Courts below found Judges Bazelon and Holtzoff, plus the jury, with Webster; and Chief Judge Edgerton and Judge Prettyman with Packard.

3. *New Conflicts in the Second and Ninth Circuits*

The unfortunate uncertainty and confusion discussed in the preceding paragraphs is enhanced by decisions in the Ninth and Second Circuits published since the filing of the petition for certiorari herein: namely, *Flintkote* v. *Lysfjord* (C.A. 9), 246 F. 2d 368, published in the advance sheets of September 30, 1957, and *Technical Tape Corp.* v. *Minnesota Mining & Manufacturing Co.* (C.A. 2) 247 F. 2d 343, published in the advance sheets of October 21,

1957. The relevant parts of these opinions are attached as Appendices A and B of this petition.

These decisions squarely conflict with the decision below. The conflict is this:- In the Second and Ninth Circuits, if, as the result of an agreement with one or more dealers, a manufacturer refuses to continue to deal with other competing dealers, a question of fact as to the reasonableness of the restraint imposed is presented for determination by the jury under proper instructions. Not so in the District of Columbia Circuit where such agreements will be held to be lawful *per se* if the District Court Judge happens to be of a personal view that there are available other commodities as "reasonably interchangeable" with the product in question as cellophane is with glassine, waxed paper and foil.

Flintkote holds that a manufacturer's freedom to sell to anyone or no one is not absolute; that the question whether a manufacturer's conduct is an innocent and lawful exercise of its private right, or is a participation in an unlawful conspiracy or in aid of monopolistic ends, is properly submissible to a jury in the perspective of all the circumstances of each case; and that the fact that the manufacturer was coerced by economic threats is not a defense. The *Flintkote* decision is precisely in accord with the instructions under which the District Court submitted petitioner's case to the jury. It is in conflict with the majority decision in the *Webster* case, which set aside the verdict, not because of insufficient evidence for a verdict under the instructions, but on the ground that Packard's right to agree with Zell to eliminate Zell's competitors was unqualified, even though the agreement was entered into because of Zell's threat to give up its franchise if it was not given a monopoly of the Baltimore Packard market.

Technical Tape holds that while ordinarily a manufacturer may refuse to deal with a distributor for rea-

sons sufficient to itself, this right must be exercised in good faith, and may not be exercised in such manner as to substantially lessen competition or tend to create a monopoly in any line of commerce. This holding also is in accord with what the District Judge told the jury and the dissenting Circuit judge approved in petitioner's case; and is in conflict with the majority holding that it was as a matter of law improper to submit the case to the jury on such grounds.

It will be remembered that the propriety of submission to the jury of the reasonableness of an exclusive dealership was specifically declared by the Tenth Circuit in *Paramount Film Distributing Corp.* v. *Village Theatre* (C.A. 10) 228 F. 2d 721. That decision, citing with approval the District Court here, is cited in petitioner's petition for certiorari. Also in the petition, pp. 13-17, are cited eight other decisions in the First, Second, Third, Fourth, Sixth and Seventh Circuits which conflict with the Circuit Court decision below.

We believe that the pronouncements as to antitrust law in *Webster* are so in conflict with those in *Flintkote*, *Technical Tape* and *Village Theatre*, and are so susceptible of divergent litigation-promoting interpretations, as to make clarification by this Court desirable.

Petitioner's case is immediately available as an appropriate vehicle. It involves, and full discussion will therefore tend to settle, the question which is common to both exclusive dealerships and territorial protection — namely, the reconciliation, under the Rule of Reason, of conflicts between the right of manufacturers to agree with a dealer or dealers to refuse to deal with other competing dealers and the Sherman Act's prohibition of agreements in unreasonable restraint of interstate commerce.

Conclusion

For all the foregoing reasons petitioner asks the Court to reexamine and to grant its petition for certiorari.

THE WEBSTER MOTOR CAR COMPANY
By its attorneys:

WILLIAM J. HUGHES, JR.
821 - 15th Street, N.W.
Washington, D. C.

DONALD D. WEBSTER
3502 Turner Lane
Chevy Chase, Maryland

Certificate of Counsel

I, William J. Hughes, Jr., attorney for petitioner, hereby certify that the foregoing petition is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58 of the Rules of the Supreme Court.

WILLIAM J. HUGHES, JR.

APPENDIX A

Flintkote Company v. Lysfjord (C.A. 9) 246 F. 2d 368; reported in the advance sheets of September 30, 1957.

A dealer in Flintkote's acoustical tile brought a treble damage action against several competitors handling the same product and Flintkote, alleging that the competing dealers induced Flintkote to discontinue selling to plaintiff by threatening to discontinue their purchases unless Flintkote stopped selling to plaintiff. A settlement with the competing dealers was effected pendente lite, and the case went forward against Flintkote alone. The Circuit Court held that the evidence warranted submission of the case to the jury, and its verdict for plaintiff; but remanded on the issue of damages. With respect to liability, the following statements were made by the Court at pp. 374, 375, 376, and 377:

> "Defendant maintained its refusal to deal with plaintiff was a legitimate business decision; that it had no part in the alleged conspiracy among the original 'Association defendants' to restrain trade.
>
> * * *
>
> "If that refusal was not the result of the exercise of ordinary business judgment, but the result of threats made and pressure applied by members of the known conspiracy to and against Flintkote, the act of refusing to sell would constitute knowing participation. Because one is coerced by economic threats to participate in or aid and abet an illegal scheme does no excuse the actor."
>
> * * * *
>
> "Where there has been proof (a) that a conspiring group of tile dealers disclosed to a supplier, directly or by inference, an accomplished unlawful purpose and intent to boycott non-participating dealers, (and hence disclosed the existence of a conspiracy) and (b) thereafter one or more dealers had threatened

the supplier on numerous occasions that they intended jointly and severally to refuse to buy from the supplier if the supplier continued to sell acoustical tile to plaintiffs, and (c) if the supplier, having been selling to non-conspirators, thereafter refused to sell to non-conspiring dealers because of the threats, it cannot be maintained, as a matter of law, that such decision not to sell was a lawful exercise of the supplier's business judgment.

"It is true that one engaged in private enterprise may select his own customers, and in the absence of an illegal agreement, may sell or refuse to sell to a customer for good cause, or for no cause whatever. But it is not for the seller to finally decide that it was for a good business reason, or no reason, that he refused to deal. That decision, placed in its proper perspective of circumstances and facts known to the seller, must be judged by the trier of facts, to determine if it was an innocent and lawful exercise of the seller's private right, or an act which showed knowing participation in an unlawful conspiracy.

"Were it otherwise, there could never be a civil judgment nor any criminal conviction against any manufacturer of products flowing in interstate commerce. He could merely state—'despite my knowledge of a conspiracy which existed, which I knew to be unlawful, I'm innocent and cannot be held liable because I say I exercised my business judgment, and I can refuse to sell to anyone, and that is lawful, no matter what the circumstances may be.'

* * * *

"The rule of freedom of sale to anyone or no one is not absolute. Nor can it be tested in a vacuum. The *Colgate* case [*United States* v. *Colgate & Co.*] 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992,

> 'was not intended to give blanket sanction for individual discretion in refusal to deal. The Court soon determined that its holding did not extend to protect a course of dealing which *inferentially* spelled out the factor of agreement that Colgate lacked. More important, the Court's landmark decision in *Federal Trade Commission*

v. *Beech-Nut Packing Co.* places any refusal to deal in its business perspective and then against the full facts scrutinizes all pertinent antitrust prohibitions the trade pattern suggests.

'Viewed in the larger business setting, even individually conceived refusals to deal may become an integral element in a violation of Section 1 of the Sherman Act *** Also, Section 2 may forbid refusals to deal for monopolistic ends. *Eastman Kodak Co. of New York* v. *Southern Photo Materials Co.*, 1927, 273 U.S. 359, 47 S. Ct. 400, 71 L. Ed. 684.'

'[Report of the Attorney General's National Committee to Study the Antitrust Laws, March 21, 1955.]'"

[Note: The opinion was written by Hon. Stanley N. Barnes, J. who shortly before, as Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, had declared and implemented the Department policy discussed in Point 1 of this petition for rehearing.]

APPENDIX B

Technical Tape Corp. v. Minnesota Mining & Manufacturing Co. (C.A. 2) 247 F. 2d 343; reported in the advance sheets of October 21, 1957.

In a declaratory judgment action to have defendant's patent declared invalid, or, if valid, then not infringed, defendant counterclaimed for damages from infringement, and plaintiff's reply charged that misuse by defendant of its patent deprived it of a right to relief. In analyzing the evidence and concluding that plaintiff's defense of lack of clean hands was not established, the court made the following statement at p. 358 of the controlling principles on which the propriety of defendant's conduct was to be judged:

> "A manufacturer has the right to stop dealing with a distributor or jobber who is acting unfairly towards his product or is trying to undermine his trade. That seems to be a proper corollary of *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600, at page 614, 34 S. Ct. 951, at page 955, 58 L. Ed. 1490, where it was held that:
>
> > 'A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade.'
>
> "Ordinarily a manufacturer may refuse to deal with a distributor or jobber for reasons sufficient to himself. *United States* v. *Colgate & Co.*, 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992; *United States* v. *Schrader's Son, Inc.*, 252 U.S. 85, 97, 40 S. Ct. 251, 64 L. Ed. 471; and *Brosious* v. *Pepsi-Cola Co.*, 3 Cir., 155 F. 2d 99, 101-102. Of course, this right of a manufacturer must be exercised in good faith, and within the restrictions of the Clayton Act, and may not be exercised in such a manner so as to 'substantially lessen competition' or 'tend to create a monopoly' in any line of commerce.

"The record in the case does not establish that 3M's refusal to sell to five of the abovenamed distributors was done in bad faith, and had as its purpose to substantially lessen competion, or had a tendency to create a monopoly. Further, the Clayton Act was not intended to reach every remote lessening of competition. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 356-357, 42 S. Ct. 360, 66 L. Ed. 653.

"There has been no showing here that 'competition has been foreclosed in a substantial share of the line of commerce affected,' by the so-called select distributorship policy. *Standard Oil Co. of Cal. and Standard Stations* v. *United States*, 337 U.S. 293, 69 St. Ct. 1051, 1062, 93 L. Ed. 1371; *Dictograph Products* v. *Federal Trade Commission*, 2 Cir., 217 F.-2d 821, 825. This is not a case where the manufacturer imposed a uniform exclusive dealing confract on its jobbers and distributors, such as was the situation in the *Dictograph* and *Russell* cases, hereinbefore cited, on which plaintiff relies."

Office Supreme Court
MAY 23

No. 213

IN THE

Supreme Court of the United States

October Term 1957

THE WEBSTER MOTOR CAR COMPANY,
Petitioner

v.

PACKARD MOTOR CAR COMPANY, ET AL.,
Respondents

MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING OF THIS COURT'S ORDER OF OCTOBER 14, 1957, DENYING CERTIORARI; AND PETITION FOR REHEARING

THE WEBSTER MOTOR CAR COMPANY
By Its Attorney,
DONALD DENT WEBSTER
Tingley Road, M.R. 17
Morristown, New Jersey

WILSON - EPES PRINTING CO - RE 7 6002 - WASHINGTON 1, D. C.

INDEX.

PAGE

MOTION OF LEAVE TO FILE PETITION FOR REHEARING OF THIS COURT'S ORDER OF OCTOBER 14, 1957 DENYING CERTIORARI ... 1

I The soundness of the decision of petitioner's case will be ruled on by this Court in three cases now pending therein ... 2

II Proceedings in the courts below relating to taxation of costs furnish an additional reason for granting the petition ... 2

Conclusion ... 3

* * * *

PETITION FOR REHEARING OF THIS COURT'S ORDER OF OCTOBER 14, 1957 DENYING CERTIORARI ... 1

I The soundness of the decision of petitioner's case is before this Court in three cases pending therein ... 1

II There is a conflict between petitioner's case and the perfume cases ... 1

III Conflict with Paramount Film Distributing Corp. v. Village Theatre, 228 F. 2d 721 ... 6

IV Other circumstances bearing on the propriety of allowance of this petition and review of this case by this court ... 7

Conclusion ... 9

Citations

	Motion PAGE	Petition PAGE
Guerlain, Inc. v. *United States*, 155 F. Supp. 77 October Term No. 692	2	1
Lanvin Parfums, Inc. v. *United States*, 155 F. Supp. 77, October Term No. 751	2	1
Parfums Corday, Inc. v. *United States*, 155 F. Supp. 77, October Term No. 752	2	1
Northern Pacific Railway Co. v. *United States*, March 10, 1958, 26 L. Wk. 35		2
Paramount Film Distributing Corp. v. *Village Theatre, Inc.* (C.A. 10) 228 F.2d 721		6
Schwing Motor Car Co. v. *Hudson Sales Co.*, 135 F. Supp. 899; 239 F. 2d 176; cert. den. 355 U. S. 823		6, 7
United States v. *du Pont & Co.*, 351 U. S. 377	2	3
Turner: "Antitrust Policy and the Cellophane Case," 70 Harv. L. Rev. 281		5
Chapman in 6 Kansas Law Review 384		9

IN THE

Supreme Court of the United States

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No. 213

THE WEBSTER MOTOR CAR COMPANY,
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v.

PACKARD MOTOR CAR COMPANY, ET AL.,
Respondents

MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING OF THIS COURT'S ORDER OF OCTOBER 14, 1957, DENYING CERTIORARI

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Webster Motor Car Company respectfully applies to the Court for leave to file a petition for rehearing of this Court's order of October 14, 1957, denying certiorari.[1]

---

[1] The District Court decision is reported at 135 F. Supp. 4. The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 243 F. 2d 418.
Certiorari was denied October 14, 1957, 355 U.S. 822; rehearing was denied December 9, 1957, 355 U.S. 900.

I The soundness of the decision of petitioner's case will be ruled on by this Court in three cases now pending therein.

Petitioner feels justified in making this second request for rehearing because three cases are pending before this Court [2] in which the soundness of the decision of petitioner's case by the United States Court of Appeals for the District of Columbia Circuit is directly in issue, and petitioner believes, for the reasons stated in the accompanying petition, that this Court will reverse the Circuit Court's decision in favor of respondent. The relevant market reasoning and decision of the Circuit Court is not warranted by, and is an unauthorized extension of, this Court's decision in the cellophane case, *United States v. du Pont & Co.*, 351 U.S. 377.

To assist this Court in its consideration of the *Webster* case, petitioner has filed today a motion for leave to file a brief *amicus curiae* and brief *amicus curiae* in the perfume cases.

II Proceedings in the courts below relating to taxation of costs furnish an additional reason for granting the petition.

Following denial of certiorari in this case, and denial of rehearing, Packard has recently taken steps in the United States Court of Appeals for the District of Columbia Circuit preparatory to trying to impose on Webster a crushing burden of costs—over $40,000.

Packard's attempt to crush the last breath of financial life out of petitioner by exacting enormous costs is almost certain to become the subject of a full-fledged law suit, with eventual appeal to this Court. Packard's next taxa-

---

[2] *Guerlain, Inc.* v. *United States*, No. 692; *Parfums Corday, Inc.* v. *United States*, No. 751; *Lanvin Parfums, Inc.* v. *United States*, No. 752.

tion-of-costs move undoubtedly will be in the District Court for the District of Columbia where the case is still actively pending.

The gross injustice of such an attack upon petitioner by the party whom a jury and two respected judges below (Judge Holtzoff and Judge Bazelon) found to have conspired to accomplish, and to have accomplished, the unlawful destruction of petitioner's business worth $190,000, needs no elaboration.[3] It makes a mockery of this Court's frequent pronouncements that private-party antitrust suits must be encouraged as important enforcement aids. Indeed, doubly so here, where petitioner, without asking or receiving any Government assistance, successfully carried the heavy antitrust burden of proof and expense further than any private party has done before in the District of Columbia Circuit, or any automobile dealer has ever done before in any Circuit. To make matters worse, the man whom Packard seeks thus finally to destroy—Richard Webster, owner of the Webster Company—led the world in Packard sales for 11 consecutive years (1926-1936). What is more, Packard has never contended that the Webster business was conducted in a way which failed to reflect credit on Packard. Packard's Washington manager, Braden, who best knew the Webster operation, testified to its excellence.

Petitioner respectfully suggests that by granting this motion and its accompanying petition resolution of the issue as to costs will be held in abeyance until this Court has ruled on petitioner's case in its decision of the three perfume cases now before the Court.

Conclusion

Petitioner prays that because of the impending decision of the perfume cases, involving, as its almost cer-

[3] Judge Holtzoff's opinion is reported at 135 F. Supp. 4; Judge Bazelon's dissenting opinion at 243 F. 2d 421.

tainly will, a review of the still very much alive *Webster* case, this Court will either:

a. Grant this motion for leave to file the accompanying petition for rehearing of the order of this Court denying certiorari; or

b. Withhold decision on this motion and petition until, in the course of deciding the perfume cases, it rules on the correctness of the *Webster* case so heavily relied on by the perfume company appellants.

Respectfully submitted,

THE WEBSTER MOTOR CAR COMPANY
By Its Attorney
DONALD DENT WEBSTER
Tingley Road, M.R. 17
Morristown, New Jersey

Certificate of Service

I, Donald Dent Webster, hereby certify that service of the foregoing motion and accompanying petition was made on May 26, 1958 by mailing copies thereof, with first class postage prepaid, to Robert W. Barker, Counsel of Record for Packard Motor Car Co. at his Post Office address 744 Jackson Place, Washington 6, D. C.

DONALD DENT WEBSTER
Tingley Road, M.R. 17
Morristown, New Jersey

May 26, 1958

PETITION FOR REHEARING OF THIS COURT'S ORDER OF OCTOBER 14, 1957 DENYING CERTIORARI

I The soundness of the decision of petitioner's case is before this Court in three cases pending therein.

Since the denial of petitioner's petition for certiorari on October 14, 1957, and denial of its petition for rehearing on December 9, 1957, this Court has noted jurisdiction of three cases which directly present for decision by this Court the correctness of the decision of this case by the Court of Appeals for the District of Columbia Circuit, 243 F. 2d 418. Those cases—referred to herein as "the perfume cases"—are *Guerlain, Inc.* v. *United States*, No. 692, *Parfums Corday, Inc.* v. *United States*, No. 751, and *Laurin Parfums Inc.*, v. *United States*, No. 752.

Each of the perfume companies was found by District Judge Edelstein (155 F. Supp. 77) to have violated section 2 of the Sherman Act by attempting to monopolize and by actually monopolizing its own brand of trademarked toilet goods. Each company is asking this Court to reverse the judgment against it on the ground that it is in conflict with the relevant market doctrine and decision in the *Webster* case, and that Judge Edelstein erred in distinguishing, rather than following, the *Webster* decision.

II There is a conflict between the Webster case and the perfume cases.

Webster's complaint charged that Zell Motor Car Co., a large dealer in Baltimore who disliked competing with Webster and another Packard dealer there as to trade-in allowances and the cost of parts and service, told Packard that it would go out of business and not buy any more cars unless Packard agreed not to sell any more cars

to Webster and the other competing dealer. Packard secretly agreed (although it had no complaint against the other dealers, and no prior thought of not continuing their franchises) and terminated their dealerships. This, Webster claimed, violated the Sherman Act in that:

(a) Interstate commerce in Packard cars was unreasonably restrained by an agreement and conspiracy in violation of Section 1; and

(b) The attempt of Zell and Packard to give Zell a monopoly of the sale of Packard cars in Baltimore was effected through an agreement and conspiracy in violation of section 2.

The District Court left to the jury all the vital questions of fact. It left to the jury the question of which of the two types of competition was more important to the Baltimore public,—competition between Packard dealers there, or competition there between Packard and other makes of cars. The jury was instructed that if it found the latter the more important it should bring in a verdict for Packard. The jury was also instructed that unless it found the restraint imposed by the Zell-Packard agreement to be unreasonable and injurious to the Baltimore public Packard could not be held liable.

The jury found for Webster; and Packard's motions for a new trial and for judgment n.o.v. were denied, 135 F. Supp. 4.[1]

---

[1] Cf. *Northern Pacific Railway Co. et al.* v. *United States*, March 10, 1958, Vol. 26 L. Wk. No. 35, March 11, 1958. The situation there of a refusal to sell unless the buyer agreed to the seller's demand that competition in freight traffic be eliminated is in essence no different from the *Webster* case where Zell refused to buy from Packard unless Packard eliminated competition in the sale of Packard cars in Baltimore. An agreement in unreasonable restraint of interstate commerce, induced by economic pressure, is clearly violative of the Sherman Act.

A divided Court of Appeals reversed, 243 F. 2d 418. Chief Judge Edgerton and Judge Prettyman held that under the doctrine of the cellophane case, *United States v. du Pont & Co.*, 351 U.S. 377, 393, the relevant market *as a matter of law* embraced all makes of automobiles, not just Packards. They then carried their relevant market reasoning over into Section 1, and held,—despite the jury's verdict that the restraint imposed was in fact unreasonable,—that it was reasonable as a matter of law because there were other makes of cars still available.

Judge Bazelon dissented on the ground that the charge of violation of Section 2, with its related relevant market issues, need never have been reached in deciding the appeal, since there was ample evidence to support the jury's finding that the restraint imposed was unreasonable and in violation of Section 1.

Thus the *Webster* case clearly involved:

(a) Alleged violations of Section 1 and 2;

(b) A conspiracy between a supplier and a preferred dealer whereby the supplier, under economic pressure from the dealer, stopped selling to all of the other competing dealers in that area,—in short, a conspiracy to eliminate competitors, and an accomplished attempt to create a monopoly.

(c) A jury verdict for Webster which, in view of the Court's instructions, could not have been rendered except for the fact that the jury found the relevant market to be the Baltimore Packard market; and the agreement an unreasonable restraint,—and

(d) A unique, high-priced make of automobile which is never sold "off-the-shelf" by a dealer selling other competing brands; whose trade-in value is greatest when offered to Packard dealers; and the repair of which often can be accomplished only by Packard tools and factory-trained mechanics.

None of these factors justifying a narrow construction of the relevant market were present in the perfume cases.

Each of the perfume cases involves an alleged violation of Section 2 only. The defendants were charged with attempting to monopolize and monopolizing their own trade-marked toilet goods.

They were not charged with having agreed or conspired with anyone.

Nor were they charged with having imposed an unreasonable restraint on interstate commerce.

They were not accused of eliminating existing competition.

No jury verdict, as in the *Webster* case, supports the District Judge's finding of fact that the relevant market in each of the perfume cases was restricted to each defendant's own trade-marked toilet goods.

Unlike the unique high-priced Packard automobiles involved in the *Webster* case, each of the perfume cases concerns one brand of trade-marked toilet goods, sold "off-the-shelf" by dealers selling competing brand toilet goods off the same shelf.

Unlike the usual trade-in involved in the sale of a new Packard, no trade-ins interfered with the cross-elasticity of demand for the various brands of perfumes.

Nor were there any specialized repair or service considerations involved in the sale of toilet goods by the perfume case defendants.

There are at least two respects in which there is an irreconcilable conflict between the decisions in *Webster* and the perfume cases, which should be resolved by this Court.

(a) If, as a matter of law, as held by the Court of Appeals in *Webster*, an agreement between a dealer and

a manufacturer as to a single brand of automobile cannot constitute an unreasonable restraint of interstate commerce in violation of section 1 of the Sherman Act, it certainly must follow that there cannot be an unlawful attempt of a manufacturer to monopolize only his own brand of toilet goods in violation of section 2.

The *Webster* decision, as it stands, clearly supports the perfume company appellants' contention that if as a matter of law there cannot be an attempt to monopolize a particular make of automobile there cannot be an attempt to monopolize a brand of trade-marked toilet goods.

(b) Judge Edelstein cited with approval Professor Turner's article "Antitrust Policy and The Cellophane Case," 70 Harvard Law Review 281 (1956). At p. 305 Professor Turner says:

> "If defendants are attempting to drive someone out of the market by foul means rather than fair there is ample warrant for not resorting to any refined analysis as to whether the intent is to drive everyone out or whether, having taken over all of the production of a particular commodity, the defendants would still face effective competition from substitutes. Coercive conduct is analogous to price fixing, attempts at which are illegal . . . 'and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 n 59 (1950).'"

And at p. 307:

> "It is reasonable to discard any refined concept of market in attempt and conspiracy cases, because the conduct involved is so egregious that it may be appropriately condemned per se."

It was largely in reliance on this doctrine that Judge Edelstein decided the perfume cases against the defendants. See his discussion at pp. 85-86 of his opinion, where he summed up his thinking in the statement:

> "Where, however, exclusionary conduct demonstrates a specific intent to prevent competition, the analogy of the attempt and conspiracy cases is forceful. The fact that an attempt is successful is hardly reason to destroy the analogy, and a limited definition of the market is therefor appropriate."

It seems clear that if Judge Edelstein had understood the *Webster* case, he would have realized that it is in conflict with what is quoted above, and would have been forced to a flat disagreement with, and would have rejected, appellant's reliance on *Webster*.

It is only fair to suggest that the 4th Circuit's *per curiam* affirmance of the Schwing case (*Schwing Motor Car Co.* v. *Hudson Sales Co.*, 138 F. Supp. 899; 239 F. 2d 176, cert. den. 355 U.S. 823) and this Court's denial of certiorari in *Webster* may have diverted Judge Edelstein's attention from a careful reading of those cases.

However that may be, applicant firmly believes that the *Webster* decision is erroneous because (a) it conflicts with the sound reasoning of Professor Turner as to attempt and conspiracy cases; (b) it improperly treats as applicable to Section 1 cases, and to cases involving attempts to monopolize, the statement of Mr. Justice Reed at page 393 of the decision in the cellophane case, *supra*, that "the power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly"; (c) it overrides a jury decision as to relevant market and public injury rendered under instructions which were not challenged by the Circuit Court majority.

III Conflict With Paramount Film Distributing Corp. v. Village Theatre, 228 F. 2d 721.

The majority opinion in the Court of Appeals decision of petitioner's case makes clear that great reliance was placed on the views of Professor Milton Handler set forth

in The New York Bar Association Record, Vol. 11, No. 7, p. 367. See 243 F. 2d at pp. 420, 421. The article urges that both the Tenth Circuit in *Village Theatre* and Judge Holtzoff in petitioner's case were in error in holding that the reasonableness or unreasonableness of a verticle agreement to eliminate competitors is a jury question. Professor Handler had appeared for defendants in the *Village Theatre* case, and presumably made the same argument there. In a later article, The Record, Vol. 12, No. 7, p. 411, following the Court of Appeals decision of petitioner's case and the 4th Circuit decision in the *Schwing* case, *supra*, Professor Handler restates the conflict between *Village Theatre* and the decisions in petitioner's case and in *Schwing*, and argues that the *Village Theatre* decision is not sound law.

Petitioner has only recently learned through counsel for the Village Theatre that, following remand of the case by the Tenth Circuit for a jury trial of the issue of reasonableness of the restrictive agreement, the case has been settled. In consequence, there is no possibility that that case can be brought to this Court through normal procedure for resolution of the conflict. It can be resolved only by a ruling such as is available and is now requested by this petition.

IV Other circumstances bearing on the propriety of allowance of this petition and review of this case by this Court.

(a) The granting of this petition may avert the imposition on petitioner of a crushing and improper burden of costs.

Following denial of certiorari in this case, and denial of rehearing, Packard has recently taken steps in the United States Court of Appeals for the District of Columbia Circuit preparatory to trying to impose on Webster a crushing burden of costs—over $40,000.

Packard's attempt to crush the last breath of financial life out of petitioner by exacting enormous costs on Webster is almost certain to become the subject of a full-fledged law suit, with eventual appeal to this Court. Packard's next taxation-of-costs move undoubtedly will be in the District Court for the District of Columbia where the case is still actively pending.

The gross injustice of such an attack upon petitioner by the party whom a jury and two respected judges below (Judge Holtzoff and Judge Bazelon)[4] found to have conspired to accomplish, and to have accomplished, the unlawful destruction of petitioner's business worth $190,000, needs no elaboration. It makes a mockery of this Court's frequent pronouncements that private-party antitrust suits must be encouraged as important enforcement aids. Indeed, doubly so here, where petitioner, without asking or receiving any Government assistance, successfully carried the heavy antitrust burden of proof and expense further than any private party has done before in the District of Columbia Circuit, or any automobile dealer has ever done before in any Circuit. To make matters worse, the man whom Packard seeks thus finally to destroy—Richard Webster, owner of the Webster Company—led the world in Packard sales for 11 consecutive years (1926-1936). What is more, Packard has never contended that the Webster business was conducted in a way which failed to reflect credit on Packard. Packard's Washington manager, Braden, who best knew the Webster operation, testified to its excellence.

Petitioner respectfully suggests that by granting this petition resolution of the issue as to costs will be held in abeyance until this Court has ruled on petitioner's case in its decision of the three perfume cases now before the Court.

---

[4] Judge Holtzoff's opinion is reported at 135 F. Supp. 4; Judge Bazelon's dissenting opinion at 243 F. 2d 421.

(b) There is great confusion in antitrust law circles as to the extent to which the relevant market considerations discussed in the cellophane case are relevant and decisive in cases involving conspiracies or agreements to eliminate competition, and attempts to monopolize, and not involving actual monopoly. Professor Turner's article, *supra*, is one of many current articles on the subject. Another example—which approaches the matter with particular attention to exclusive dealerships—is by Chapman, in Kansas Law Review, Vol. 6, p. 384, March 1958.

Conclusion

Petitioner respectfully urges that the decision of the Court of Appeals in this case is wrong and destructive of sound development of antitrust doctrine for the reasons stated above and in the petition for certiorari and for rehearing; and that the immence of a pronouncement upon this case in the course of decision of the perfume cases warrants allowance of this petition.

Wherefore petitioner prays that this petition be allowed.

THE WEBSTER MOTOR CAR CO.
By Its Attorney

DONALD DENT WEBSTER
Tingley Road, M.R. 17
Morristown, New Jersey

Certificate

I, Donald Dent Webster, certify that this petition is presented in good faith and not for delay and that it is restricted to the grounds specified in Rule 58-2 of the Rules of this Court.

DONALD DENT WEBSTER

Office - Supreme Court, U.S.
FILED
JUN 4 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

THE WEBSTER MOTOR CAR COMPANY,
Petitioner,
v.
PACKARD MOTOR CAR COMPANY, *et al.*,
Respondents.
No. 213

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING OF THIS COURT'S ORDER OF OCTOBER 14, 1957, DENYING CERTIORARI

This brief is filed by respondents, Packard Motor Car Company (hereinafter referred to as "Packard"), Marshall Beck and C. M. Porter, in opposition to the motion of The Webster Motor Car Company (hereinafter referred to as "Webster") for leave to file, out of time, a second petition for rehearing of this Court's order denying certiorari.

Webster filed its petition for a writ of certiorari during the October Term, 1956 (Docket No. 1113). The petition was denied by order dated October 14, 1957 (355 U. S. 822). A petition for rehearing of the petition for a writ of certiorari was filed by Webster during the October Term, 1957 (Docket No. 213). The petition for rehearing was denied by order dated December 9, 1957 (355 U. S. 900).

The bases for respondents' opposition to Webster's petition for a writ of certiorari were set forth in respondents' brief in opposition to that petition.

Webster's present motion is asserted (p. 2) to be "justified" by the pendency before this Court of three cases: *Guerain, Inc.* v. *United States*, Docket No. 692; Parfums *Corday, Inc.* v. *United States*, Docket No. 751; and *Lanvin Parfums, Inc.* v. *United States*, Docket No. 752 (hereinafter collectively referred to as the "perfume cases"). Webster asserts (p. 2) that "the soundness of the decision of petitioner's case by the United States Court of Appeals for the District of Columbia Circuit is directly in issue" in those cases.

Webster has filed a motion for leave to file a brief *amicus curiae* in the perfume cases, pointing out (p. 2) that all parties to those cases refused to consent to the filing of that brief. In that brief, Webster states (p. 1) that the purpose of the brief was as follows:

> "The purpose of this brief is to prove that Judge Edelstein, while correct in refusing to follow the *Webster* case, rejected it for wrong reasons, which if endorsed by this Court will seriously impair the enforcement of the Sherman Act."

and concludes its discussion of Judge Edelstein's opinion in the perfume cases as follows (p. 6):

> "It seems clear that if Judge Edelstein had understood the *Webster* case, he would have realized that it is in conflict with what is quoted above, and would have been forced to a flat disagreement with, and would have rejected, appellant's reliance on *Webster*.
>
> "It is only fair to suggest that the 4th Circuit's per curiam affirmance of the *Schwing* case (*Schwing Motor Car Co.* v. *Hudson Sales Co.*, 138 F. Supp. 899; 239 F. 2d 176; cert. den. 355 U. S. 823) and this Court's denial of certiorari in *Webster* may have diverted Judge Edelstein's attention from a careful reading of those cases."

ARGUMENT

On its present motion, Webster fails to present, as required by Rule 58 of the Rules of this Court, any intervening circumstances of substantial or controlling effect or any substantial ground not previously presented which would warrant receipt, out of time, of its second petition for rehearing. All of the arguments on the merits in Webster's new petition for rehearing were made in Webster's petition for a writ of certiorari and its first petition for rehearing. Indeed, even the prospect that this Court would hear the perfume cases was present when Webster's petition for certiorari was before this Court, since the decision of the District Court was referred to in Webster's reply to respondents' brief in opposition to the petition for certiorari (pp. 5, 8) and it was clear then that the perfume cases would be likely to come before this Court on direct appeal.

For the following additional reasons, the pendency of the perfume cases before this Court affords no support for Webster's motion:

1. The decision of the Court of Appeals in the present case rested on the alternative ground that, as a matter of general common law, the alleged acts complained of by Webster "inflicted no damage" because Webster rejected the usual one-year renewal of its dealership agreement. The Court of Appeals summarized the facts in this connection as follows:

> "* * * After Webster protested and threatened suit, Packard offered Webster the usual one-year renewal but refused to promise more. Packard told Zell, in effect, that this would be Webster's last renewal. Webster declined Packard's offer, quit the business, and brought this suit."

The alternative ground of the decision was stated by the Court of Appeals as follows:

> "3. Though Packard had formerly expressed an intention, not to renew its contract with Webster, Packard offered and Webster refused the usual renewal. That Packard had agreed with Zell not to renew Webster's contract again when the proffered renewal expired is immaterial, not only because the agreement was legal but also because it inflicted no damage."

This alternative ground, involving a simple non-federal question as to the legal effect of Webster's refusal of the usual renewal of its dealership agreement, is in no way involved in perfume cases.

2. In his determination of the relevant market issue in the perfume cases, Judge Edelstein relied specifically on the facts of record in those cases (155 F. Supp., at pp. 84-86, 88-89, 92, 95). On the other hand, the Court of Appeals in the present case determined on the record before it that there was no evidence to support a jury decision that the relevant market was a Packard market. The overwhelming, undisputed evidence in the record compelled the conclusion that the relevant market was the automobile market (R. 475, 493-4, 498-9, 668-9, 671, 672-3, 704-5, 193, 207, 361, 376-7, 452; Def. Ex. 26, R. 1131). Thus, even if this Court should affirm the decision of the District Court in the perfume cases on the ground that the relevant markets in those cases were markets for the respective trademarked articles involved in those cases, there would be no occasion for a reversal of the decision of the Court of Appeals in the present case.

CONCLUSION

It is respectfully submitted that Webster's motion should be denied.

Respectfully submitted.

HAROLD L. SMITH
JEROME G. SHAPIRO
One Wall Street
New York 5, New York

ROBERT W. BARKER
744 Jackson Place, N. W.
Washington 6, D. C.
Attorneys for Respondents